IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1673

MARENGO COUNTY BOARD OF EDUCATION,
Petitioner,

v.

ANTHONY T. LEE,
Plaintiff,
UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
NATIONAL EDUCATION ASSOCIATION, INC.,
Plaintiff-Intervenor,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

H. A. LLOYD
P. O. Drawer Z
Demopolis, Alabama 36732
Counsel for Petitioner

Of Counsel:
LLOYD, DINNING & BOGGS
P. O. Drawer Z
Demopolis, Alabama 36732

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Fifth Circuit

Petitioner, Marengo County Board of Education, prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Fifth Circuit entered in the above case on the 5th day of February, 1979.

OPINIONS BELOW

1. The opinion of the District Court for the Middle District of Alabama (Three-Judge Panel), dated June 12, 1970, is unreported. A copy is attached hereto as Appendage A.

2. The opinion of the District Court for the Southern District of Alabama, dated August 7, 1978, which is reported at 454 Fed. Supp. 918.

3. The opinion of the Court of Appeals for the Fifth Circuit, dated February 5, 1979, and reported at 588 Fed. 2d 1134.

JURISDICTION

The basis upon which the jurisdiction of this Honorable Court is invoked is to seek review of the Judgments of the United States Court of Appeals, Fifth Circuit, dated February 5, 1979, a copy of which is appended to this Petition and designated Appendage F. This review is sought under the provisions of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in denying Petitioner's Motion to dismiss the appeal of the United States of America from the District Court's Order of August 7, 1978?

2. Whether the Order of the District Court of August 7, 1978, constituted an "Order Denying Injunctive Relief" so as to make it an appealable order under 28 U.S.C.A., Sec. 1291, 1292(a)?

3. Does the Record on Appeal sustain the Court of Appeals' Ruling reversing the Order of the District Court of August 7, 1978?

4. Did the Court of Appeals err in undertaking to evaluate the matter de novo based upon facts which came into existence subsequent to the District Court's Order appealed from and subsequent to the filing of the Appeal; and making the evaluation of such matter the entire basis for its finding?

5. Did the Court of Appeals err in overruling the District Court's Judgment in fashioning an equitable remedy in this cause by concluding only one month after the District Court's Order was implemented that the freedom of choice assignment portion of his plan "has not worked"?

6. Is the ruling of the Court of Appeals in conflict with previous rulings within its own jurisdiction and in other jurisdictions of the nation?

7. Has the Court of Appeals erred in failing to defer to the trial court's exercise of remedial discretion in the formulation of a desegregation remedy?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

1. 28 U.S.C.A. 1291, vesting in the various Courts of Appeals jurisdiction to review all final decisions of the District Courts.

2. 28 U.S.C.A. 1292:

> "(a) The Courts of Appeals shall have jurisdiction of appeals from: (1) Interlocutory Orders of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the Judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

3. 42 U.S.C. 2000(c)-6(a) (Pertinent portions of the Civil Rights Act of 1964).

STATEMENT OF THE CASE

The suit out of which this Petition arises originated in 1963 in the state-wide litigation of *Lee v. Macon County Board of Education,* Civil Action No. 604-E (M.D. Ala.) which was heard by a three-judge panel. This Petitioner became a party defendant in that litigation in the late 1960's.

On June 12, 1970, that Court entered its terminal order.[1] (See Appendage A). The Court thereupon transferred the case into the District Court for the Southern District of Alabama, and the Petitioner has been under the jurisdiction of that Court since 1970. Various orders were thereafter entered and various proceedings were had, culminating in the order of the District Court dated August 7, 1978 (see Appendage B). All intermediate proceedings prior to August 7, 1978, are more specifically detailed in the above mentioned District Court Order attached as Appendage B.

During the course of the litigation from 1970 to the present date, the school physical plants comprising the school system have dwindled from 15 in number to 5. Student enrollment in the system is 80% black and 20% white. Of the 5 schools now remaining, 3 are all black, 1 is predominantly black and 1 is predominantly white with a black enrollment of some 30% to 40%.

From 1970 to the present time, the United States has acted as Plaintiff-Intervenor in this litigation and, in virtually all instances, has been the sole mover and complainer in regard to the progress of desegregation in the system.

All Findings of Facts preliminarily detailed by the District Court in its Order of August 7, 1978, insofar as they apply to

[1] The terminal order was authored by Circuit Judge Richard Rives and Chief Judge Frank Johnson of the Middle District of Alabama.

the history of the case, in the interest of brevity, are adopted herein by reference.[2]

On August 14, 1978, the United States filed its notice of appeal from the District Court's Judgment entered August 7, 1978. (See Appendage C.)

On August 18, 1978, the United States filed its Motion for Summary Reversal. (Appendage D) On or about September 7, 1978, Petitioner filed its Motion to Dismiss the Appeal. (Appendage E)

After oral arguments, the Court of Appeals requested Petitioner to furnish attendance figures for the current school year, which was then less than one month in progress. This request directed that the attendance figures be broken down according to schools and also according to elementary and high school grades. These figures were compiled on September 22, 1978, and are documented in Appendage F hereafter mentioned.

Thereafter, on February 5, 1979 the Court of Appeals rendered its opinion which is attached hereto as Appendage F.

JURISDICTION AS TO LOWER COURTS

The Trial Court has jurisdiction by virtue of 42 USCA, 1983 and 2000a-6. The Court of Appeals assumed jurisdiction under 28 USCA 1291, 1292(a).

[2] See Appendage B.

ARGUMENT

(Questions 1 and 2)

The Court of Appeals erred in denying Petitioner's Motion to Dismiss the Appeal filed by the United States of America from the Order of the District Court for the Southern District of Alabama, dated August 7, 1978.

Finality as a condition of review is a historic characteristic of Federal Appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all.[3]

The purpose and foundation of this policy is not in merely technical conceptions of "finality". It is one against piece-meal litigation. The case is not to be sent up in fragments. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.[4]

A "final decision" within 28 U.S.C. 1291, the basic statute authorizing appeals to the Courts of Appeals has been defined as "one which ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment".[5]

The Court of Appeals in the instant case assumed this jurisdiction under the provisions of 28 U.S.C. 1292 (a), taking the position that the District Court denied the injunctive relief sought by the Government as to student assignment.

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[3] *Taylor v. Board of Education of the City of New Rochelle*, 288 Fed. 2d 600 (1961); citing *Cobbledick v. United States*, 309 U.S. 323, 60 S.Ct. 540 (1940).

[4] *Catlin v. United States*, 1945, 324 U.S. 229, 65 S.Ct. 631 (cited in Taylor v. Board of Education of the City of New Rochelle, supra).

[5] *Catlin v. United States*, supra.

The United States, in its Motion for Supplemental Relief, filed in 1977, and which was the initial basis for the present Court Ruling, reads, in part, as follows:

> "The United States . . . moves this Court for entry of an order requiring the Defendants . . . to develop, adopt and implement . . . a new plan of student and faculty assignment which will effectively desegregate the public schools operated by Marengo County Board of Education and thereby bring the system into compliance with current constitutional standards . . ."

The United States prevailed in the trial court, the issues being decided in the Plaintiff's favor in that Court.

The lower court thereupon fashioned its remedy by virtue of "judicial intervention into the affairs of the Marengo County Board of Education", and entered upon a "tightly monitored" program calculated to effectively desegregate the public schools operated by Marengo County Board of Education and to bring the system into compliance with constitutional standards.

A reference to various aspects of the lower court's ruling reveals that the lower court's approach still left the quantum of relief to be more fully determined as the results of the monitoring would dictate from time to time. For instance, the court anticipated the construction of one central facility and required the Board to make periodic reports as to the progress of acquiring such a facility, and further directed as follows:

> "Until a central facility can be constructed, the Court elects to take a constitutional approach to the problem . . . all students presenting themselves to the educational processers of Marengo County shall have an equal opportunity to obtain an education of equal quality to that of any other students in the system which the Board must provide at any institution or establishment that they elect

to attend that the School Board can presently afford to operate."[6]

The lower court, in its opinion, also stated:

> "The Court is of the opinion that freedom of choice ought to be implemented in Marengo County so that its effectiveness as a desegregation tool may be properly assessed."[7]

It is quite obvious from the tenor of the lower court's ruling generally, as well as the specific examples set out above, that the quantum of relief was to be flexible and continuing. For instance, if that facet of the remedy having to do with freedom of choice, even though such method has not been declared unconstitutional, should prove to be ineffective under the present circumstances of this school system, further alternatives under the District Court's ruling would be forthcoming. Ultimately, however, the remedy provided for one central school plant, the progress of which the lower court was also monitoring.

In the case of *Taylor v. Board of Education of the City of New Rochelle* (cited supra), a school desegregation case, the court had ruled that the Plaintiff's rights had been violated, and commenced to fashion a remedy by requiring the School Board to come forward with a further desegregation plan. At that point, the School Board appealed the cause and the Court, in dismissing the appeal, stated as follows:

> "An order adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own."

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[6] *Lee v. Marengo County Board of Education*, 454 Fed. Suppl., 918.

[7] *Lee v. Marengo County Board of Education*, supra.

Parenthetically, it is to be noted that the United States, in its Motion for Supplemental Relief, did not request that any specific plan which it promulgated be adopted, but simply a remedy for the constitutional violations it had alleged existed. Further, the United States does not argue that the relief detailed in the lower court's order of August 7, 1978, is unconstitutional; only that the United States considered its own method of relief to be more effective. Petitioner contends that, in assessing whether this amounts to "denial of injunctive relief", there is no logical distinction between the facts in *Taylor*, supra, where the remedy which the trial court there commenced to fashion required the production of a plan by the school board, and the instant case where the Court itself has orchestrated a constitutional plan as a preliminary step, but subject to tight monitoring under its own judicial intervention to assess the permissibility of it in the course of implementation by the school board. It cannot be denied that if, after the full quantum of relief has been determined under the lower court's order, the same proves ineffective in desegregating the Marengo County Schools further, the United States will then have ample opportunity to seek supplemental relief at that time, and if the same is denied, to appeal therefrom.

The United States contends, and in the instant case, the Court of Appeals agrees, that the lower court's ruling was an "order denying injunctive relief sought by the Government" and was, therefore, appealable under 28 U.S.C. 1292(a). A definitive case dealing with the above cited statute as it applies to school desegregation cases is *Taylor v. Board of Education of the City of New Rochelle*, supra, rendered in the United States Court of Appeals for the Second Circuit. In treating the question as it applies to desegregation cases, the Court in that case stated:

> "Our review of the cases that have reached Appellate Courts in the wake of *Brown v. Board of Education*, supra and its supplement, 1955, 349 U.S. 294, 75 S. Ct. 753,

has revealed only one in which jurisdiction may have been taken under such circumstances as here. In *Clemons v. Board of Education of Hillsboro*, Sixth Circuit, 1956, 228 Fed. 2d 853; *Brown v. Ripey*, Fifth Circuit, 1956, 233 Fed. 2d 796; *Booker v. State of Tennessee, Board of Education*, Sixth Circuit, 1957, 240 Fed. 2d 689, and *Holland v. Board of Public Instruction*, Fifth Circuit, 1958, 258 Fed. 2d 730, the appeals were from final orders denying injunctive relief. In *Aaron v. Cooper*, Eighth Circuit, 1957, 243 Fed. 2d 361, an injunction was denied because of a voluntary plan offered by the Little Rock School District, which the District Court found satisfactory, but jurisdiction was retained; since the order denied an injunction, it was, therefore, appealable whether it was deemed final or interlocutory."

Can it be said in the case at bar that the lower court has entered an order denying injunctive relief to the United States, when the relief sought in its Petition was "a new plan of student and faculty assignment which will effectively desegregate the public schools . . . and thereby bring the system into compliance with current constitutional standards . . ."? While this may possibly be interpreted as a request for a modification of an existing injunction, mandatory in nature, nevertheless, the lower court has not denied the injunctive relief sought by the Government in its Petition, but has undertaken the implementation of the relief sought preliminarily in a form different from that which the Justice Department itself considers more effective. The relief sought to be accomplished was to effectively and constitutionally desegregate the public schools, not the pairing of the public schools. On the other hand, the Lower Court, having found pairing not to be feasible as to certain specific schools, nevertheless granted injunctive relief in the manner already described above, calculated to accomplish the relief sought; therefore, there was nothing from which to appeal.

The lower court has not denied the injunctive relief actually sought by the Government. Therefore, its ruling does not come within the purview of 28 U.S.C. 1292(a); and the appeal should have been dismissed.

(Questions 3, 4, 5 and 7)

Petitioner contends that the Record on Appeal does not sustain the ruling of the Court of Appeals reversing the judgments of the lower court in this cause. Rather, it has obtained evidence, after the Appeal and after the Record was sent up, dealing with the result of the first step in the implementation of the very order which is appealed from, has considered and evaluated this evidence de novo, and has used that evaluation as the sole basis for reversal of the lower court's ruling.

More specifically, in initiating the substantive portion of its reversal order, the Court of Appeals stated:

> "Marengo County has a small rural school system, largely black, with approximately 80% black students and 20% white students. Following oral argument at our direction, the Marengo County Board submitted attendance figures for the past three years in the school system. Those for the current school year are included, having been compiled one month (on September 22, 1978) after school convened for the present school year."[8]

Thereafter, the above mentioned evidence was reproduced in the margin of the opinion. The Court then concluded:

> "The statistics graphically indicate that the presently court-ordered freedom of choice assignment plan is not working to achieve desegregation, and that a majority of the schools in the system are entirely black while the others are predominantly white."

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[8] *Lee, et al. v. Marengo County Board of Education*, 588 Fed. 2d 1134.

The Court of Appeals further concluded:

> "The Court's Order appealed from in the instant case produced no effective result, as the student enrollment figures for the present school year furnished us by the Board amply demonstrate. Accordingly, the Motion of the United States for Summary Reversal is granted."

The statistics referred to will reflect that there are five school facilities in the system, each with student bodies ranging from kindergarten to the Twelfth Grade. While the Court of Appeals has evaluated these statistics to show that a majority of the schools in the system are entirely black while the others are predominantly white, this is not reflected exactly in that manner by the statistics. A. L. Johnson High, John Essex High and Marengo High are indeed all black. Sweet Water High is predominantly black and Marengo County High is predominantly white but integrated to the extent that more than 30% of its students are black. Given the unique circumstances of this case,[9] it is not unusual to expect some all-black school facilities —after all, the county is virtually all-black. It should suffice to say, however, that all of the school facilities are integrated so that no white student attends a school that is not integrated.

The District Court in the case at bar is intimately familiar with the facts and circumstances surrounding the problems of desegregation in the Marengo County School System, having had this matter under his jurisdiction over a period of many years. In addition, he is intimately familiar with the desegregation problems in the surrounding areas, inasmuch as they have also been under his jurisdiction over a period of years. He has personally observed the effects of various devices calculated to remove all vestiges of segregation and discrimination from these systems. He has observed and analyzed the results of the various approaches to the problem. It is, therefore, in keeping with sound judgment and good judicial practice that the approval of a school desegregation plan in the instant case be committed to the exercise of his sound discretion.[10] Indeed, as stated in *Evans v. Buchanan*, supra.

[9] The System is 80% black and 20% white; largely rural; with the whites being accumulated in two small town concentrations.

> "A school desegregation case does not differ fundamentally from other cases involving framing of equitable remedies to repair denial of a constitutional right . . . formulation of a practical and effective school desegregation remedy is an undertaking peculiarly within the province of the trial court, and, on appeal, the reviewing court must defer to the trial court's exercise of remedial discretion if it has applied proper legal precepts and remained within determined legal boundaries."

Nevertheless, the Court in the present instance has summarily reversed the lower court's ruling, and this apparently not on the basis of the Record sent up on Appeal, but on supplemental information and evidence of facts which took place subsequent to the Appeal and which, moreover, furnished incomplete facts as to the results of the lower court's ruling occurring only within one month subsequent to the time it was initiated.

It is stated law that a Court of Appeals, as a court reviewing a school desegregation order, is not empowered to consider the matter de novo.[11]

In the absence of a specific finding that the trial court acted in an arbitrary or unreasonable manner in exercising his discretion in regard to fashioning a desegregation plan, Petitioner contends that the Court of Appeals erred in substituting its own judgment, based on a cursory enrollment report one month

[10] *Evans v. Buchanan*, 582 Fed.2d 750 (1978).

[11] Evans v. Buchanan, supra, at P. 760.

after the implementation of the lower court's remedy, submitted to it subsequent to oral arguments; as opposed to a remedy fashioned by the lower court based upon years of experience with this school system and many months of work in accumulating evidence, analysing feasibilities, and formulating the remedy.

The District Court in his Finding of Facts concluded that the plan proposed by the United States was not a feasible alternative. While the Court of Appeals has indicated no basis for nullifying this Finding of Fact, it has, nevertheless, ruled that if the Marengo County Board of Education fails to file a constitutionally acceptable student assignment plan within thirty days, the plan proposed by the United States must be implemented. In the light of the fact that the lower court has found it necessary to judicially intervene and has fashioned a desegregation plan as its own remedy (a course of action with which the Court of Appeals agrees); then the summary action of the Court of Appeals in nullifying the remedy amounts to nothing more than a consideration of this matter de novo by the Court of Appeals.

(Question No. 6)

While freedom of choice approaches have been declared to be ineffective, based on the particular facts of individual cases, such an approach has nowhere been declared unconstitutional. It must be conceded, however, that in virtually all desegregation cases, the doctrine is that each case must be considered on its own particular facts and no one desegregation plan will apply to all school systems. In the instant case, however, no case has been cited wherein freedom of choice has been determined to be ineffective involving a school system with similar unique circumstances as those which exist in the Marengo County System. Those unique circumstances primarily are that the total enrollment in the System is virtually all black, being

80% black and 20% white; that the whites are situated largely in two small town concentrations; that the area is highly rural and that there are only five school facilities in the System. Nevertheless, cases with these unique circumstances have been before the Fifth Circuit or within its jurisdiction. One of the most notable of these is that portion of *Singleton v. Jackson Municipal Separate School District* (419 Fed. 2d 1211) (1970), which deals with the St. John the Baptist Parish, Louisiana (No. 28361). A portion of the system is on the east bank of the Mississippi River and a portion is on the west bank. The Mississippi River is a natural barrier. In that case, Judge Ainsworth of the Fifth Circuit Court of Appeals made the following observation:

> "As to the west bank schools, the present enrollment is 1626 Negro and 156 whites. The whites, under freedom of choice, all attend the same school, one of five schools on the west bank. The 156 whites are in a school with 406 Negroes. We affirm as to this part of the plan. We do not believe it necessary to divide this small number of whites already in a desegregated minority position amongst the five schools."

Another case of note with similar unique circumstances insofar as the ratio is concerned is the case of *Calhoun v. Cook*, 362 Fed. Supp. 1249 (1973). In that case, the Court said:

> "The plan incorporates the mandatory Fifth Circuit provisions of majority to minority transfer (United States v. Jefferson County Board of Education, 372 Fed. 2d 836, Fifth Circuit, 1966) and faculty and staff desegregation. (Singleton v. Jackson Municipal Separate School District, 419 Fed. 2d 1211 (Fifth Circuit, 1970). It also provides a reasonable pupil assignment plan considering the small percentage of white children (21%) now remaining in the system, and all white pupils are assigned to integrated school. This preponderance of blacks is in itself a unique

situation. Under such circumstances, it is not necessary to distribute the remaining minority whites pro rata throughout the entire system. *Harris v. St. John the Baptist Parish,* Louisiana, 419 Fed 2d 1211, 1221 (Fifth Circuit, 1969); *Lee v. Macon County Board of Education,* 429 Fed. 2d 1218 (Fifth Circuit, 1970); *Hightower v. West,* 430 Fed. 2d 552 (Fifth Circuit, 1970); *Love v. Dade County School Board,* 447 Fed. 2d 150 Fifth Circuit, 1971) cert. den. 405 U.S. 1064, 92 S. Ct. 1493, 31 L.Ed. 2d 794; *United States v. State of Georgia,* No. 12974 (N.D.Ga.) . . ."

In line with the reasoning in connection with the *St. John the Baptist Parish* case, supra and the *Calhoun* case, supra, the lower court in the case at bar, setting out his remedy, stated:

> "It is not practical to give each school in an 80% black system a sprinkling of whites in order to be able to say social engineering works and each school is integrated. You can say that the schools are desegregated, however, by giving each student an equal opportunity to obtain an equal education."

The decision of the Court of Appeals in the instant case does not reflect that any consideration was accorded the Findings of Fact reflected in the lower court's order which caused him to formulate the remedy in this desegregation case. Such factors include the unique circumstances in this system making it virtually on all fours with the physical facts existing in the *St. John the Baptist Parish case,* cited supra, and the *Calhoun* case, supra. In addition, those factors included lack of feasibility of pairing due to bussing difficulties, overcrowding and other physical and economic factors. Also included in the choice of remedies was the element of white flight, thereby losing the progress already made in desegregation. This particular element in the instant case was not speculative but was based on actual experience in the surrounding areas when the United States plan was instituted.

These failures on the part of the Court of Appeals are in conflict with the Second Circuit case of *Evans v. Buchanan,* cited supra, wherein that Court stated:

> "Formulation of a practical and effective remedy is an undertaking peculiarly within the province of the trial court, and we intend to defer to the Court's exercise of remedial discretion if it has applied the proper legal precepts and remained within determined legal boundaries."

While the Court of Appeals, in its opinion, made no mention of any of the above factors and while white flight cannot be accepted for achieving anything less than complete uprooting of a dual public school system, nevertheless, in choosing between various permissible plans, the Court may select the one which is calculated to minimize white boycotts.[12]

In this connection, the reasoning of Judges Johnson and Rives in the June 12, 1970 Court Order pertaining to Marengo County should be specifically noted and evaluated (See Appendix, p. A-6, 7), when they stated therein:

> "In the past eighteen months, the United States Court of Appeals for the Fifth Circuit, under which Court's decisions this Court is expressly bound, has reversed district courts in scores of cases for attempting to innovate with the theory of gradualism such as the Marengo County school board here suggests. Thus, we find ourselves under a compulsion that requires the entry of an order in this school desegregation case that will probably result in an all-black student body, where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited. However, the United States, through the United States Department of Justice, insists

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[12] *Stout v. Jefferson County Board of Education,* Fifth Circuit, 537 Fed.2d 800.

upon a strict application of these legal principles to the Marengo County school system. Faced with these clear mandates from the appellate courts and the insistence of the Government that they be applied, we have no alternative except to apply them."

Many years have passed since that prophetic observation and considerable progress has been made in the area of desegregation in Marengo County. The Lower Court's order of August 7, 1978 seeks to preserve the desegregation presently existing in this system and to improve upon it through his own continuing judicial monitoring. That, also is the objective sought in this petition.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

H. A. LLOYD
P. O. Drawer Z
Demopolis, Alabama 36732
Attorney for Petitioner, Marengo County Board of Education

Of Counsel:

LLOYD, DINNING & BOGGS
P. O. Drawer Z
Demopolis, Alabama 36732

APPENDIX

APPENDIX A

In the United States District Court for the Middle District of Alabama, Eastern Division

Anthony T. Lee, et al., Plaintiffs, United States of America, Plaintiff-Intervenor and Amicus Curiae, National Education Association, Inc., Plaintiff-Intervenor, vs. Macon County Board of Education, et al., Defendants.	Civil Action No. 604-E Marengo County School System

Order

(Filed June 12, 1970)

As required by the order of this Court of August 6, 1969, the United States, through its Office of Education, filed on December 1, 1969, a proposed plan for the effective and complete disestablishment not later than the commencement of the 1970-71 school year of the dual school system based upon race operated by the Marengo County Board of Education. As allowed by the order of this Court of December 10, 1969, the plaintiffs and the National Education Association, Inc., as plaintiff-intervenor, filed their written objections to the plan as proposed by the United States, and the Marengo County school board on January 24, 1970, filed an alternative plan for the desegregation of the Marengo County dual school system. On March 3, 1970,

this Court ordered the United States, through its Office of Education, to file a further plan; this plan was filed on April 3, 1970.

An analysis of the school board's alternative plan reflects that the Board proposes to establish four school zones for the operation of its school system, where black students outnumber white students approximately four to one.[1] The Board proposes to assign and transport the white students throughout the school system to the Marengo County High School at Thomaston, Alabama, and to the Sweet Water High School at Sweet Water, Alabama; the Board proposes, further, that the student body in each of these schools be composed of 75% white students and 25% Negro students. The Board further proposes that during the 1972-73 school year additional Negro students be assigned to the point that they constitute 35% of the student body in these two schools, and that there will be an annual progressive reduction of white students by 5% and an increase of Negro students by 5% until these two schools are composed of 50% white students and 50% Negro students. The Board proposes that the remaining schools in the system, approximately nine, continue to operate with only Negroes attending them.

The plan as filed by the United States on April 3, 1970, also proposes to establish zones, with the requirement that the students residing in these zones, both black and white, attend the school that offers the appropriate grade within the zone in which they reside. The projected enrollment, according to the plan of the United States, for each of the schools to be operated by the Marengo County Board of Education is set out in the appendix attached to this order.

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[1] The latest figures furnished this Court reflect that there are approximately 736 white sudents and 3,050 black students enrolled in the Marengo County school system.

While the proposel of the Marengo County Board of Education will possibly result in some of the white students remaining in the public school system of Marengo County, it will "freeze" a large majority of the Negro students in all-Negro schools. The Board's proposal when analyzed is nothing more than a plan to assign Negro students for the 1970-71 school year to the Marengo County and Sweet Water High Schools up to the point where Negro students will constitute 25% of the total student enrollment in each of these schools. The argument in support of the proposal of the Board is that when the student body in any given school is predominantly black the white students will flee. The law is clear that "white flight" or the threat thereof from the public school system is not a valid consideration when formulating a plan for a unitary school system. Hostility to racial desegregation will not excuse a court or a school board for failing to accomplish desegregation in the manner and to the extent required by the Constitution. *Cooper v. Aaron*, 358 U.S. 1 (1958). The Supreme Court wrote most explicitly in *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968):

> Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. "But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Brown II*, at 300.

In *Anthony v. Marshall County Board of Education*, 409 F.2d 1287 (1969), the United States Court of Appeals for the Fifth Circuit reversed the lower court for basing its ruling, in part, on the fact that the white students would flee from the public schools where Negro pupils heavily preponderated; and, again, the Fifth Circuit, in *United States v. Indianola Municipal Separate School District*, 410 F.2d 626, wrote on this point as follows:

> The school board explicitly argues that the faculty desegregation requirements we impose today will result in wholesale withdrawal of white students from the school system. The board believes that this will cause the schools to lose the public support they need to function effectively. The principal answer to these speculations is that those who disagree with constitutional imperatives cannot avoid their application. Monroe v. Board of Commissioners of City of Jackson, Tenn., et al., supra, note 3, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed. 2d at 739. Our system of a government of laws surely could not survive if it were otherwise.

The most recent treatment of such a plan and argument as the Marengo County Board of Education now presents to this Court was given by the Fifth Circuit in *United States v. Hinds County School Board*, 417 F.2d 852 (1969) (the Mississippi school cases). There, the Fifth Circuit wrote:

> In the same vein is the contention similarly based on surveys and opinion testimony of educators that on stated percentages (e.g., 20%, 30%, 70%, etc.), integration of Negroes (either from influx of Negroes into white schools or whites into Negro schools), there will be an exodus of white students up to the point of almost 100% Negro schools. This, like community response or hostility or scholastic achievement disparities, is but a repetition of contentions long since rejected in Cooper v. Aaron, 1958, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed. 2d 5; Stell v. Savannah-Chatham County Bd. of Ed., 5 Cir., 1964, 333 F.2d 55, 61; and United States v. Jefferson County Bd. of Ed., 5 Cir., 1969, 417 F.2d 834 [June 26, 1969].

The plan as proposed by the United States, filed April 3, 1970, meets the minimum constitutional requirements. Since the school board's plan does not, the plan proposed by the United States of necessity will be ordered implemented by the

Board not later than the commencement of the 1970-71 school year.

Each member of this Court is acutely aware of the customs and traditions of the people in this section of our country. We enter this order in this case with the full realization that, effective with the commencement of the 1970-71 school year, the student body in the Marengo County school system will, in all probability, be composed of only Negro students. However, on numerous occasions district courts have been given explicit mandates, both by the Supreme Court of the United States and the several circuit courts—particularly the Fifth Circuit—as to what will be and what will not be constitutionally acceptable timetables and methods in the desegregation of public school systems. Our experience in this state-wide school case teaches that with the cooperation of the local school boards, which we have in most instances received, these constitutional principles can be implemented without serious disruption of the school systems' operation and to the advantage, economically, administratively and educationally, of all concerned. However, in school systems such as the one operated by the Marengo County Board of Education, the implementation of these constitutional mandates will in all probability result, at least for the time being, in an all-black attended school system. Of course, this is not good for either race. We have searched for a solution but have found none. The Supreme Court of the United States in *Green v. County School Board of New Kent County*, 391 U.S. 430, put district courts and boards of education under this injunction:

> The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a "white" school and a "Negro" school, but just schools. [Footnote omitted.]

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969), puts this Court in the position of not being able to accept even that portion of the Board's plan that provides for progressive increase of Negro students in a desegregated facility:

> Against this background the Court of Appeals should have denied all motions for additional time because continued operation of segregated schools under a standard of allowing "all deliberate speed" for desegregation is no longer constitutionally permissible. Under explicit holdings of this Court the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools. *Griffin v. School Board*, 377 U.S. 218, 234 (1964); *Green v. County School Board of New Kent County*, 391 U.S. 430, 438-439, 442 (1968).

On this point, in *Dowell v. Board of Education of Oklahoma City Public Schools*, 396 U.S. 269 (1969), the Supreme Court re-emphasized the timing involved in cases such as these:

> The burden on a school board is to desegregate an unconstitutional dual system at once.

In the past eighteen months, the United States Court of Appeals for the Fifth Circuit, under which Court's decisions this Court is expressly bound, has reversed district courts in scores of cases for attempting to innovate with the theory of gradualism such as the Marengo County school board here suggests.[2] Thus,

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[2] *United States v. Jefferson County Board of Education*, 380 F. 2d 385 (1967); *Adams v. Mathews*, 403 F.2d 181 (1968); *United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086 (1969); *Henry v. Clarksdale Municipal Separate School Dist.*, 409 F.2d 682 (1969); *Anthony v. Marshall County Board of Education*, 409 F.2d 1287 (1969); *United States v. Indianola Municipal Separate School District*, 410 F.2d 626 (1969); *Plaquemines Parish School Board v. United States*, 415 F.2d 817 (1969); *United States v. Jefferson County Board of Education*, 417 F.2d 834 (1969); *United States v. Choctaw County Board of Education*, 417 F.2d 838 (1969); *United States v. Board of Education of Baldwin County*, 417 F.2d 848 (1969); *United States v. Hinds County School Board*, 417 F.2d 852 (1969); *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (1969); *Hilson v. Ouzts*, No. 28,491, January 6, 1970; *United States v. Tunica County School District*, No. 28,912, January 6, 1970; *Bivins v. Bibb County Board of Education & Thomie v. Houston County Board of Education*, No. 29,-121, February 5, 1970; *Ellis v. Board of Public Instruction of Orange County, Fla.*, No. 29,124, February 17, 1970; *United States v. Board of Education of Baldwin County, Ga.*, No. 28,880, March 9, 1970.

we find ourselves under a compulsion that requires the entry of an order in this school desegregation case that will probably result in an all-black student body, where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited. However, the United States, through the United States Department of Justice, insists upon a strict application of these legal principles to the Marengo County school system. Faced with these clear mandates from the appellate courts and the insistence of the Government that they be applied, we have no alternative except to apply them.

Accordingly, it is the ORDER, JUDGMENT and DECREE of this Court that the plan filed by the United States, through its Office of Education, on April 3, 1970, as the same relates to the Marengo County school system, be and the same is hereby approved as to Sections I, II, III, IV, V and VII. It is further ORDERED that the Marengo County Board of Education, the individual members thereof and its superintendent, implement said plan of desegregation as hereinafter ordered supplemented, not later than the commencement of the school year 1970-71.

It is further ORDERED that said plan be supplemented as follows:

1. **Desegregation of Faculty and Other Staff**

[Following paragraph numbered 3 in Section III, entitled "Faculty Desegregation"]

4. In the event that the system, in connection with its conversion to a unitary system, plans to dismiss or demote personnel, as those terms are used in the preceding numbered paragraph, a report containing the following information shall be filed with the Court and served upon the parties by July 15, 1970:

a. the system's "nonracial objective criteria" used in selecting the staff member(s) dismissed or demoted;

b. the name, address, race, type of certificate held, degree or degrees held, total teaching experience and experience in the system and position during the 1969-70 school year of each person to be dismissed, or demoted, as defined in the preceding numbered paragraph; and in the case of a demotion, the person's new position during the 1970-71 school year and his salaries for 1969-70 and 1970-71;

c. the basis for the dismissal or demotion of each person, including the procedure employed in applying the system's "nonracial objective criteria";

d. whether or not the person to be dismissed or demoted was offered any other staff vacancy; and, if so, the outcome; and, if not, the reason.

2. **Majority to Minority Transfer Policy**

The school system shall permit a student attending a school in which his race is in the majority to choose to attend another school, where space is available and where his race is in the minority.

3. **Services, Facilities, Activities and Programs**

No student will be segregated or discriminated against on account of race or color in any service, facility, activity or program (including transportation, athletics, or other extra-curricular activity) that may be conducted or sponsored by or affiliated with the school in which he is enrolled. A student attending school for the first time on a desegregated basis will not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer or newly assigned student except that such transferees shall be subject to longstanding, non-racially based rules of city, county or state athletic associations dealing with the eligibility of transfer students for athletic contests. All school use or school-sponsored use of athletic fields, meeting rooms, and all other school-related services, facilities, activities and programs such as commencement exercises and parent-teacher meetings which are open to persons other than enrolled students, will be open to all persons without regard to race or color. All special educational programs conducted by the school system will be conducted without regard to race or color.

It is further ORDERED that the Marengo County Board of Education file with this Court, in writing, on or before July 1, 1970, and furnish copies to counsel for the plaintiffs and the plaintiff-intervenors, the United States and the National Education Association, Inc., a projection of the enrollment in each of the schools to be operated by the Marengo County school system for the 1970-71 school year, and the racial composition of the student body and the faculty and staff members in each of said schools. It is further ORDERED that the Marengo County Board of Education file with this Court on or before September 30, 1970, and furnish copies to counsel for the plaintiffs and the plaintiff-intervenors, a written report on the actual enrollment in each of the schools operated by the

Marengo County school system, and the racial composition of the student body and the faculty and staff members in each of said schools.

Done, this the 12th day of June, 1970.

/s/ (Illegible)
United States Circuit Judge

/s/ H. H. GROOMS
United States District Judge

/s/ (Illegible)
United States District Judge

Attest: A True Copy.

Certified to June 12, 1970.

Clerk, U. S. District Court,
Middle District of Alabama.

By SARA P. BUSH
Deputy Clerk

Appendix

MARENGO COUNTY SCHOOL SYSTEM
PROJECTED ENROLLMENT 1970-71 SCHOOL YEAR

		Student Enrollment		
Name of School	**Grades**	**White**	**Negro**	**Total**
ZONE I:				
Marengo High	8-12	219	402	621
Sweet Water	4-7	179	395	574
Coxheath	1-3	104	303	407
Totals		502	1100	1602

NOTE: Putnam and Myrtlewood may be used for other educational purposes, such as a materials center, special education,

adult education, etc. or other purposes which the school district may choose.

ZONE II:

Marengo County	10-12	65	248	313
Marengo Co. Training	1-9	169	706	825
Faunsdale	1-6	*	121	121
Totals		234	1075	1309

*NOTE: Zone to be drawn by local school district on a non-discriminatory basis. The attendance map for the Marengo County High reflects a number of white students residing near Faunsdale Attendance Center.

ZONE III:

John Essex and Jefferson Complex	1-12	0	736	736
Palmetto	1-6	*	139	139
Totals		0	875	875

*NOTE: Zone to be drawn by local school district on a non-discriminatory basis. The attendance maps supplied by the school district do not show any white students residing in this area.

APPENDIX B

In the United States District Court for the
Southern District of Alabama
Northern Division

Anthony T. Lee, et al.,
Plaintiffs,
United States of America,
Plaintiff-Intervenor,
National Education Assoc.,
Plaintiff-Intervenor,
Marengo County Board of Education,
et al.,
Defendants.

Civil Action
No. 5945-70-H

JUDGMENT

This matter came on for trial before the Court, Honorable W. B. Hand, District Judge, presiding, and the issues having been duly tried, in accordance with the Findings of Fact and Conclusions of Law, and Remedy entered this day, it is

ORDERED, ADJUDGED and DECREED that the plan of desegregation for Marengo County Schools, set out *supra* in the Remedy provisions be implemented immediately. It is further ORDERED that the defendant Board report by letter to the Court no later than August 18, 1978 its progress on this matter, and that the parties appear before the Court in Selma, Alabama on August 25, 1978, at 9:00 a.m. for further consideration of this matter. All costs of this action are taxed against the defendants.

The Court expressly retains jurisdiction of this cause to enter all necessary and further orders to effectuate or monitor the Remedy mandated by today's judgment.

DONE this 7th day of August, 1978.

/s/ W. B. HAND
United States District Judge

U. S. District Court
Sou. Dist. Ala.

Filed and Entered This the
7th Day of August, 1978

Minute Entry No. 47,013

WILLIAM J. O'CONNOR, Clerk

By: /s/ G. WALTON
Deputy Clerk

In the United States District Court for the
Southern District of Alabama
Northern Division

Anthony T. Lee, et al.,
Plaintiffs,
United States of America,
Plaintiff-Intervenor,
National Education Assoc.,
Plaintiff-Intervenor,
Marengo County Board of Education,
et al.,
Defendants.

Civil Action
No. 5945-70-H

This matter is presently submitted for the Court's consideration of the motion for supplemental relief filed on April 4, 1977 by the intervenor United States of America. The Court heard testimony and received various articles of documentary evidence at the hearing in Selma, Alabama, on May 8, 1978. The Court having considered such testimony and evidence, the

post-trial memoranda of law filed by counsel for all parties, and the depositions on file with the Court, together with the applicable law, finds as follows:

FINDINGS OF FACT

1. Marengo County Board of Education [hereinafter Board] was an original party defendant in the state-wide litigation of *Lee v. Macon County Board of Education,* Civil Action No. 604-E (M.D. Ala.) (three judge panel) instituted in the last 1960's. At the time this lawsuit was filed the Board operated a dual school system perpetuating segregation of the races by providing completely separate educational facilities for white students and black students.

2. A decree entered by the three judge panel on March 22, 1967 permanently enjoined state officials from discriminating on the basis of race in the operation and conduct of the public schools in Alabama.[1] In response to this, the Board adopted a freedom of choice program by which students were allowed to elect the school that they would attend (Plan of April 6, 1967). On August 28, 1968 a majority of the three judge panel[2] entered a decree denying the plaintiffs' motion for abandonment of the freedom of choice policy, ordering the acceleration of faculty desegregation, and ordering the closing of certain Negro

[1] The defendants were required by the decree to "take affirmative action to disestablish all state enforced or encouraged public school segregation and to eliminate the effects of past state enforced or encouraged racial discrimination in their activities and their operation of the public school systems throughout the State." (Decree of March 22, 1967, p.2). Marengo County was among the systems required by the decree to adopt a desegregation plan for the 1967-68 school year (*id.*, at p. 7), and the three judge panel's proposal (*id.*, Exhibit A) conceived the freedom of choice plan later instituted in Marengo County.

[2] Circuit Judge Richard Rives and District Judge Frank Johnson authored this decree.

schools. A later order of the panel found that the Board was in substantial compliance with this order (Order of December 16, 1968).

On August 6, 1969 the panel ordered the United States to file a plan whereby the dual system then existing in Marengo County might be effectively and completely disestablished. The plan was filed on December 1, 1969 and the Board was ordered to show cause why such plan ought not be implemented. On June 12, 1970 the Court entered its terminal order adopting the desegregation plan under which the Board was to operate[3] and transferred the case to this Court.

3. The desegregation plan accepted by the three judge panel called for the division of Marengo County into three separate school zones:

(a) Zone 1: This zone comprises the southwest area of Marengo County. It is boarded by Choctaw and Clarke Counties to the West and South, and by the other two zones to the North and East.[4] The feeder schools of Sweetwater, Coxheath, Putnam and Myrtlewood were in this zone. Coxheath was to encompass grades 1 to 3, Sweetwater grades 4 to 7, and Putnam and Myrtlewood were to be used for other educational purposes. High school students (8-12) were to attend Marengo High School.

(b) Zone 2: This zone comprises the eastern area of Marengo County. It is bordered by Wilcox and Perry Counties to the East, and by Hale County to the North. The western boundary bordered on zones 1 and 2. This zone included the feeder

[3] The plan adopted by the panel was, for the most part, that of the United States Office of Education, but the panel added provisions concerning faculty assignment, majority to minority transfers, and other matters.

[4] Zone 1's eastern boundary touches briefly on the Wilcox County line.

schools of Marengo County Training (1-9) and Faunsdale (1-6), with high school students attending Marengo County High School (10-12).

(c) Zone 3: This zone comprises the northwestern area of Marengo County. It is bordered by zones 1 and 2 to the South and East, by Choctaw and Sumter Counties to the West, and by Greene and Hale Counties to the North. Jefferson and Palmetto were the feeder schools for this zone, with John Essex High School as the high school facility.

Beyond the student assignment plan, the desegregation plan touched on other areas:

(a) Faculty assignment;[5]

(b) Transportation—"bus routes and the assignment of students to buses will be designed to insure the transportation of all eligible pupils on a non-segregated and otherwise non-discriminatory basis."

(c) School construction and site selection—all construction or selection to be "done in a manner which will prevent the recurrence of the dual school structure once this desegregation plan is implemented."

(d) Majority to minority transfer policy—such transfers required to be allowed; and

(e) Attendance outside the system of residence—permissible where such transfers are allowed on a non-discriminatory basis, unless the cumulative effect of such transfers will either reduce desegregation in either district or reinforce the dual school system.

4. On August 5, 1970, this Court modified the foregoing plan in the following respects:

[5] The panel required, for the most part, compliance with the faculty and staff provisions set out in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970).

(a) Student Assignment: In Zone 1, Marengo High School and the Sweetwater-Coxheath complex were both to house grades 1-12;[6] in Zone 2, Marengo County High and Marengo County Training (Amelia Johnson High School) were to house grades 1-12, while Faunsdale housed grades 1-6;[7] in Zone 3, the desegregation plan was not sought to be modified.

(b) Faculty Desegregation: Employment, reassignment, and transfers were to be done on a non-discriminatory basis on requirements and qualifications not related to creed or race.

These modifications were rejected by the Fifth Circuit on June 15, 1971, when it vacated and remanded the case to this Court for implementation of a constitutional plan of student assignment and for conformity of faculty assignment to the mandate of *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1219 (5th Cir. 1969).

5. On June 17, 1971 the Board was ordered by this Court to comply with the mandate of the Fifth Circuit by adopting a desegregation plan compatible with the rules set out in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), and *Singleton, supra*, and the Board was required to file semiannual reports to the Court similar to those required in *United States v. Hinds County School Board*, 433 F.2d 611, 618-19 (5th Cir. 1970). This prompted the amended plan by the Board by which students would be exposed to one or two desegregated classes per day, but, for the most part the schools themselves would remain

[6] In this zone, the Putnam School was to be closed and consolidated with the Sweetwater-Coxheath complex. The Myrtlewood School was to be closed and its students were to be sent to the Linden City School System. Some interchanging was to occur on the Sweetwater and Coxheath campuses, since most subjects were offered only at one or the other.

[7] Pupils from the two high schools were to interchange campuses for required subjects and extracurricular activities that were offered at only one campus.

racially segregated.[8] The District Court accepted this plan on August 30, 1971, but the Fifth Circuit rejected the plan, *Lee v. Macon County Board of Education*, 465 F.2d 369 (5th Cir. 1972), ordering that the previously proposed HEW plan be implemented unless the Board either produced a more effective plan or demonstrated the unworkability of the HEW plan. Thereafter, by an order dated September 14, 1972, this Court directed the Board to implement the desegregation plan proposed by the HEW office of education for Marengo County schools.

6. On November 16, 1972 the Board filed a new proposed desegregation plan that provided by the acceptance of black students in the two predominately white facilities (Sweetwater and Marengo County High) up to the maximum capacity of such facilities. The plan would alter Sweetwater from 95% to 73% white and Marengo County High from 95% to 77% white. After a hearing and on stipulation by the parties, this Court entered an order on July 16, 1973 adopting the plan under which the Board now operates.

This plan retained the zones drawn by HEW. In Zone 1, Marengo County High School was to continue to serve grades 1-12, as was Sweetwater High School. In 1973-74 students in grades 1-6 were to be assigned in such a manner that Sweetwater was 35% black. In 1974-75 grades 1-6 at Sweetwater and Coxheath were to be paired, with three grades at each school. In grades 10-12 there was to be no duplication of required courses at the two campuses, but rather the required courses were to be equitably allocated between the two schools. There was also to be no duplication of courses in grades 7-9 between Coxheath and Sweetwater. In Zone 2, the same man-

[8] The Board proposed in Zone 1 to convene all students in all grades at one school for one required class, then to return them to their respective schools. The same proposal was advanced for students in Zone 2.

date with respect to duplication of courses and equitable allocation of courses applied to grades 9-12 and 7-8. In 1973-74 students in grades 1-6 were to be assigned in such a manner that Marengo County High School was 35% black in those grades. Grades 1-6 in Marengo County High School and Marengo County Training (Amelia Johnson High School) were tentatively to be paired for the 1974-75 school year. No alterations were made in the HEW plan for Zone 3. The Court made no changes in the HEW plan with respect to faculty assignment, majority to minority transfer, transportation, school construction and site selection, or attendance outside the zone of residence, but the Court did require the filing of semi-annual reports similar to those required by *Hinds County, supra.*

The student assignment portion of the plan was amended by a consent order on September 6, 1974 to provide that all courses in grades 7-9 (other than vocational subjects) at Sweetwater and Coxheath were to be taught at the Coxheath campus, with all faculties similarly transferred, that the combined students of Marengo and Sweetwater High Schooi be broken down into integrated sections for the teaching of required high school courses,[9] that grades 1-6 at Coxheath be closed with students therein to attend Sweetwater, that students from the Marengo High area attending grades 1-6 at Sweetwater have the option of attending 1-6 at Marengo, that all courses in grades 7-8 and all required and vocational courses in grades 9-12 at Marengo County High and Marengo County Training (Amelia Johnson High School) were to be allocated so that entire grades would be bussed at one time with the combined students of both schools to be broken down into integrated sections, and that Faunsdale and Palmetto Elementary Schools be closed with the students therein assigned to other schools within the zone or in the Linden City School System. The

[9] Such a plan required the bussing of entire grades from one school to the other, but the effect was to eliminate any course duplication in required or vocational courses.

Marengo County schools have been operated and maintained under the terms of this amended plan since 1974.

7. On February 10, 1977, this Court determined that the Marengo County School System had been desegregated and unitary in nature, if not since the 1970 terminal order, then at least since July 16, 1973. The United States' objections to this determination were overruled as coming too late, and the decision was not appealed.

8. On April 4, 1977, the government filed the motion for supplemental relief that is presently before the Court. In the motion, the government requests that the Court order the defendant Board to develop, adopt, and implement a new plan of student and faculty assignment to effectively desegregate the public schools operated by the Marengo County Board of Education in order that they might be brought into compliance with the constitutional standards set out in *Swann, supra,* and *Cisneros v. Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972). As a basis for the relief requested, the government makes the following allegations:

(a) The Board operates overlapping transportation routes for schools of like grade structure, thereby maintaining the racial identities of the affected schools;

(b) The Board operates overlapping transportation routes for both the Marengo County and the Linden City School Systems, thereby aiding in the maintenance of the dual system in both districts;

(c) The Board operates segregated classrooms based on race;

(d) The Board has failed or refused to comply with the course-sharing provisions of the 1973 and 1974 orders of this Court with respect to classes at Sweetwater and Marengo High Schools and at Marengo County High School and Marengo County Training School (Amelia Johnson High School);

(e) The Board assigns its faculty to schools so as to reflect the race of students in attendance at each school; and

(f) Educationally sound, administratively feasible, and constitutionally proper alternatives are available to effectuate the desegregation of Marengo County schools.

For purposes of clarity, continuity, and convenience, the Court has elected to enter separate findings with respect to each allegation made by the government.

A. **Transportation**

9. The Marengo County Board of Education maintains and operates transportation routes both for its own system and for the Linden City School System. *See Lee v. Linden City School System,* Civil Action No. 5945-70-H (S.D. Ala., July 13, 1978). Responsibility for implementation of the routes is vested jointly in Marengo County Superintendent Fred Ramsey and Linden City Superintendent Paul Whitcomb.

10. The government's first allegation with respect to the Board's transportation policies is that the Board has operated "overlapping transportation routes for schools of like grade structure, which has the effect of maintaining the racial identities of the affected schools." (Motion for Supplemental Relief, April 4, 1977).

11. On the question of overlapping routes, the government relies almost exclusively upon transportation maps furnished by the defendants to the government that depict the routes followed in the various zones (intervenor's Exhibits 20-24).

Intervenor's Exhibits 20 and 23 consist of two maps depicting the transportation routes utilized with respect to Marengo

High School and Sweetwater High School, respectively. Exhibit 20, relating to routes going to Marengo High, shows that most routes are in the southwest corner of the county. However, bus number 126 originates in the southeast corner of the county and, after picking up several students in that area, proceeds directly past Sweetwater High and picks up students in that area on the way to Marengo County High. Exhibit 23, relating to routes going to Sweetwater High, shows that such routes encompass the entire southern area of Marengo County. The Sweetwater buses travel most of the same roads used by the Marengo buses and stop in many of the same areas. There are Sweetwater buses that drive directly past Marengo High School. Indeed, many students living within one mile of Marengo High are transported to Sweetwater High, and two Sweetwater routes actually originate in Dixon's Mill, where Marengo High is situated.

Intervenor's Exhibits 21 and 24 reflect the routes employed for the transportation of students to the Zone 2 schools. Exhibit 21 reflects the routes going to Marengo County High in Thomaston. Initially, it is clear that the Marengo County High routes overlap with the Marengo High routes in the areas of Magnolia, Hampdon and Moores Valley in the southwest corner of Marengo County. Such students are clearly within Zone 2 by virtue of assignment zone lines previously drawn by this Court, so the Marengo High buses are clearly transporting Zone 2 students to Zone 1 schools. At the other end of the county Exhibit 21 reveals that students from the John Essex zone (Zone 3) are being transported to Marengo County High. This is evidenced by the fact that bus number 139 picks up students in the areas of Old Spring Hill, Alfalfa, and the outskirts of Demopolis, all of which are in the John Essex zone. Such transportation, since it is composed mostly of white students, is in violation of prior orders of this Court. Additionally, such routes overlap with routes utilized in Zone 3. Finally, testimony of one bus driver who transports to Marengo County

High revealed that all 64 students on her bus are white (deposition of Ruth Allen, intervenor's Exhibit 5 at page 11), an unlikely result in a system that is 80% black. Exhibit 24 reflects the routes utilized to transport students to and from Amelia Johnson High School in Thomaston. The only impropriety revealed by this Exhibit is the fact that 31 students from the Shiloh area, a Zone 1 area that is served by both Marengo and Sweetwater routes, are being transported to Johnson High School in Zone 2. This is in violation of the terms of the prior court orders in that it fails to respect the assignment zone lines previously drawn and overlaps with other routes. Beyond this, the Court finds no impropriety revealed by the Johnson routes.

Exhibit 22 reveals the routes utilized in Zone 3. All of these routes are within Zone 3 and are proper, the only overlap being the Marengo County High bus, mentioned above, that has been transporting from outside of Zone 2.

12. From the evidence adduced by intervenor's Exhibits 20-24, it is clear that the defendant Board is in violation of prior court orders in some respects of its transportation policies. The transportation of students residing in one zone to a school in another zone must cease. The evidence is clear that such students could just as easily be transported to a school in their attendance zone and that the utilization of such out of zone routes imposes additional economic burdens on the Board that need not exist. An additional consideration, in view of the deposition of Ruth Allen, *supra*, is segregation of the races aboard the buses. There is no direct evidence that this resulted from Board policy, but the implication drawn from the figures is a strong one. Further, the Board put on no evidence to explain this situation.

13. The second contention of the government with respect to Board transportation policies is that the Marengo County

routes overlap with those of the Linden City School System to the extent that maintenance of the dual system in both districts is aided.

Although intervenor's Exhibit 25 indicates that some overlapping between such routes is occurring in the town of Jefferson, the government has elected to abandon this contention in view of its interest in the remedy available in the case of *Lee v. Linden City School System*, Civil Action No. 5945-70-H (S.D. Ala.). *See* intervenor's post-trial brief, at page 6 n. 5 (May 30, 1978). In view of this, the Court enters no finding with respect to the alleged overlapping between Zone 3 routes and Linden City routes.

B. Segregation of Classrooms by Race

14. Although the government raised this issue in its April 4, 1977 motion for supplemental relief, no evidence was put on concerning such segregated classrooms and the contention was not advanced by either the pre-trial or the post-trial briefs of the government. The complete lack of evidence requires a finding by the Court that the government has also abandoned this contention.

C. Course-Sharing

15. As mentioned above, the consent order of September 6, 1974 required the Board to pair required courses between Marengo High School and Sweetwater High School in Zone 1 and between Marengo County High School and Amelia Love Johnson High School in Zone 2, and to pair all courses in grades 7 and 8 in Marengo County High and Johnson in Zone 2.

16. In response to this consent order, the Board has adopted programs that can be characterized only as salutary at best. The

programs in effect in the two zones require separate consideration:

(a) Zone 1—The precise language of the 1974 consent order with respect to this zone is, in pertinent part, as follows:

> All provisions of the July 16, 1973 order governing desegregation in grades 7-12 will remain in full force and effect under this Order.[10] However, to facilitate the elimination of course duplication in grades 7-9 between Coxheath Junior High and Sweetwater beginning in 1974-75, all classes for grades 7-9 at Sweetwater and Coxheath, with the exception of vocational subjects will be taught on the Coxheath campus. Faculty presently assigned to grades 7-9 at Sweetwater will be assigned to Coxheath.
>
> To facilitate the elimination of course duplication in required and vocational courses in grades 10-12 between Sweetwater High and Marengo High, beginning in 1974-75 entire grades will be bussed one time and the combined students of both schools in that grade will be broken down into integrated sections of not more than 35 students to each section.

The program actually initiated by the Board in this zone varied significantly from the terms of this court order. Initially, it is clear that the Board employed course-sharing on a voluntary basis, with each student having the option whether he or she wished to participate (deposition of Marcus Walters, intervenor's Exhibit 16, at p. 20; deposition of J. J. Evans, intervenor's Ex-

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[10] The 1973 order set up the tri-zone plan and required, *inter alia*, that there be no duplication of required courses or of vocational home economics or agribusiness in grades 10-12 at Marengo and Sweetwater; that the required courses of English, Social Studies, and Physical Education be equitably allocated between the two schools; and that courses in grades 7-9 at Sweetwater and Coxheath be equitably allocated to the extent that there be no course duplication in these grades. *Lee v. Marengo County Board of Education*, Civil Action No. 5945-70-H (S.D. Ala., July 16, 1973).

hibit 4, at p. 24). The understanding of one principal charged with implementation of the program[11] was that the purpose of the bussing was to achieve a 50%/50% racial balance in certain classes. (Walters' deposition, intervenor's Exhibit 16, at p. 16).

The program adopted in Zone 1 called for the bussing of classes of Marengo High students to the Sweetwater High campus for certain required courses, and classes of Sweetwater High students to the Marengo High campus for other required courses.[12] Once the composite classes were situated, team teaching was employed—the composite class was taught, alternatively, by a Sweetwater teacher and a Marengo teacher (Deposition of Woodrow Campbell, intervenor's Exhibit 1, at pp. 9-10; Evans' Deposition, intervenor's Exhibit 4, at pp. 14-15; Walters' Deposition, intervenor's Exhibit 16, at p. 29). The team teachers cooperate in the formation of course outline, teaching, and assignments, but each teacher is responsible for the grading of the students from his or her own school (Deposition of Willa Johnson, intervenor's Exhibit 2, at p. 9; Deposition of Emma Wheathersby, intervenor's Exhibit 3, at p. 7; Deposition of Ella Johnson, intervenor's Exhibit 12, at p. 12; Deposition of William Michael Green, intervenor's Exhibit 15, at p. 11).

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[11] Although the Superintendent of the Board has conceded that the primary responsibility for the course-sharing program is his (Deposition of Fred Ramsey, intervenor's Exhibit 18, at p. 15), the evidence is clear that day-to-day oversight was vested in the Principals at Marengo and Sweetwater High Schools.

[12] Exhibit 1 to the deposition of J. J. Evans, intervenor's Exhibit 4, reveals the following breakdown of shared courses at Marengo and Sweetwater High Schools:

Marengo High School	*Sweetwater High School*
11th Grade Social Studies	10th Grade English
12th Grade Social Studies	11th Grade English
10th Grade Girls' Phys. Ed.	12th Grade English
12th Grade Girls' Phys. Ed.	11th Grade Girls' Phys. Ed.
10th Grade Boys' Phys. Ed.	11th Grade Boys' Phys. Ed.
12th Grade Boys' Phys. Ed.	

The salutariness of this program, if not evident in the segregated nature of the program set out above, is made clear in the manner in which the course-sharing was made available. While the 1974 consent order was absolute, not leaving room for exceptions, it is clear that course-sharing program was conducted on an irregular, rather than daily, basis (Campbell deposition, intervenor's Exhibit 1, at p. 18; W. Johnson deposition, intervenor's Exhibit 2, at p. 15; Wheathersby deposition, intervenor's Exhibit 3, at p. 10; Green deposition, intervenor's deposition, Exhibit 15, at p. 8). Indeed, one team teaching deponent could not even recall the last time prior to the deposition that her class had participated in the course-sharing (Wheathersby deposition, intervenor's Exhibit 3, at p. 11). The decision with respect to whether courses will be shared on a particular day lies with the principals (Campbell deposition, intervenor's Exhibit 1, at l. 22; E. Johnson deposition, intervenor's Exhibit 12, at p. 13; deposition of Christopher Jenkins, intervenor's Exhibit 13, at p. 10; deposition of Eugene Grace, intervenor's Exhibit 14, at p. 10; Walters' deposition, intervenor's Exhibit 16, at p. 10; deposition of Cecil Kimbrough, intervenor's Exhibit 17, at p. 17), and such sharing has often been cancelled on the basis of inclement weather or school activities (Walters' deposition, intervenor's Exhibit 16, at p. 10). The evidence does not reveal why inclement weather might preclude bussing between the schools when it did not prevent the original transportation of the students to the school in the morning.

The Court also notes, as a matter of course, that there remained during the 1977-78 school year duplication of courses with respect to required courses at Marengo and Sweetwater High School (J. J. Evans' deposition, intervenor's Exhibit 4, at pp. 23-24; E. Johnson deposition, intervenor's Exhibit 12, at pp. 7-8; Walters' deposition, intervenor's Exhibit 16, at p. 34).

(b) Zone 2—The precise language of the 1974 consent order with respect to this zone is, in pertinent part, as follows:

All provisions of the July 16, 1973 order governing desegregation in grades 7-12 will continue in full force and effect.[13] Beginning in the 1974-75 school year, in the same manner as described above for Zone 1, all courses in grades 7-8 and all required and vocational courses in grades 9-12 in Marengo County High and Marengo County Training School (Amelia Love Johnson High School) are to be allocated so that entire grades will be bussed at one time and the combined students of both schools in that grade will be then broken down into integrated sections of not more than 35 students to each section.

While the Court finds the program adopted in Zone 2 more in line with what was intended by the 1974 consent order, this program also varies significantly from the terms of the order. Zone 2 also appears to employ voluntary course-sharing, at least with respect to those Marengo County High students who participated (Deposition of Ruth Stephens, defendant's Exhibit 1, at p. 9), although this assertion is contested by one principal who stated that all Marengo County High students participated (Deposition of Brad Stephens, intervenor's Exhibit 6, at p. 9). In light of the overall program adopted, the Court does not consider this to be a crucial issue.

There are few distinctions between the program in Zone 1 and that in Zone 2. The chief difference is that team teaching was not used in Zone 2; rather each composite class had one teacher who graded students from his or her own school and students from the other school (Deposition of Allie Lewis, intervenor's Exhibit 10, at p. 10; Deposition of Barbara Hildreth,

[13] The July 16, 1973 order required in this zone that, *inter alia*, there was to be no duplication of required courses or of vocational home economics or agribusiness in grades 9-12 and no duplication of courses in grades 7-8, with such courses to be equitably allocated between the two campuses in Zone 2. *Lee v. Marengo County Board of Education*, C.A. 5945-70-H (S.D. Ala., July 16, 1973).

intervenor's Exhibit 11, at pp. 11 & 13). In the selection of teachers, a student opting for a white teacher in one required course would receive a black teacher in the other required course (B. Stephens' deposition, intervenor's Exhibit 6, at p. 16). Another difference is an apparent lack of voluntariness of participation and equality of participation. While it is not clear whether all Marengo County High students are required to participate, as noted above, it is clear that only the most intelligent Johnson High students participate, and that they are required to participate (Deposition of Richard Coates, intervenor's Exhibit 7, at pp. 12-15). Principal Coates of Johnson High School revealed that his classes are divided, on the basis of grades, into "A" and "B" sections, and that only "A" section students, the brightest, were involved in the course-sharing (*Id.* at 14 & 15).

In most other respects, there has been little difference between course-sharing in Zone 1 and in Zone 2. All required courses at the high school level were involved,[14] but not all of the junior high classes were shared (B. Stephens' Deposition, intervenor's Exhibit 6, at p. 12). The principals had primary oversight responsibility for the course-sharing provisions,[15] and dictated when the sharing was to occur (Deposition of Ruth Allen, intervenor's Exhibit 5, at p. 8; Deposition of James

[14] Only a partial list of the courses shared in Zone 2 has been revealed by the evidence. The deposition of Richard Coates, intervenors' Exhibit 7, at pp. 18-24, reveals that the following courses were shared at the school under which they are listed:

Johnson High School	*Marengo County High School*
10th Grade English	7th Grade English
11th Grade English	8th Grade English
12th Grade English	9th Grade English
	11th Grade Social Studies
	12th Grade Social Studies
	10th Grade Phys. Ed.
	11th Grade Phys. Ed.

[15] *See* Note 13, *supra*.

Amexander, intervenor's Exhibit 9, at p. 103. As in Zone 1, sharing has been cancelled upon the principal's order for weather or school activity reasons (Allen deposition, intervenor's Exhibit 5, at p. 12; Alexander deposition, intervenor's Exhibit 9, at p. 9). One final distinction between Zone 1 and Zone 2 is that it is clear that there was only one day of course-sharing during the 1976-77 school year (Lewis Deposition, intervenor's Exhibit 10, at p. 9; Hildreth Deposition, intervenor's Exhibit 11, at p. 17), although Principal Coates of Johnson stated that all English classes in grades 7-12 were shared (Coates' deposition, intervenor's Exhibit 7, at pp. 30 and 37). Finally, it is clear that there was duplication of courses at Marengo County and Johnson High School in courses not involving the sharing program (Coates' deposition, intervenor's Exhibit 7, at p. 10; Lewis deposition, intervenor's Exhibit 10, at p. 7; Hildreth deposition, intervenor's Exhibit 11, at p. 8).

17. The findings to be extracted from these programs are neither extreme nor complex. The Board has not complied with the terms of the 1974 consent order or its 1973 progenitor. The lack of compliance results not from a discriminatory intent on the part of the Board, but rather from a misunderstanding or misapplication of the terms of the prior orders. While the Court considered the terms to be straightforward and clear, the depositions of various individuals involved indicate a complete failure to grasp the essence of the Court's order. The Board superintendent considered the Zone 1 course-sharing provisions as aimed at making Sweetwater High School a majority black school (Ramsey deposition, intervenor's Exhibit 18, at p. 13). At least two principals viewed the class-sharing program as seeking a 50%/50% recial composition in the shared courses (Coates deposition, intervenor's Exhibit 7, at p. 9; Walters' deposition, intervenor's Exhibit 16, at p. 16). These conclusions were entirely incorrect. In order that further misunderstanding not occur, the remedy provisions of this decision, *infra*, contain specific responsibilities for the Board.

18. The purpose of the course-sharing order of 1974 was to attempt to provide Marengo County students with a desegregated education. Prior to the entry of this order, the Court made personal visits to each of the facilities maintained by the defendant Board to try to formulate a remedy providing desegregation through the use of existing facilities. Having viewed the facilities, the Court concluded that pairing of schools was not a viable remedy because of the nature of the facilities. Most of the schools were constructed as 1-12 facilities, and the internal facilities were equally so constructed. Most of the facilities are old and are not readily adaptable to alteration for the purpose of modifying the grade configuration therein. Since the Court was convinced that pairing of the schools themselves was not feasible from a facility standpoint, the course-sharing order was adopted as the most effective reasonable alternative desegregation technique. At the time that course-sharing was implemented, the Court was confident that its conclusions with respect to utilization of the facilities was shared by the Department of Justice. Apparently, the government has changed its mind.

Without admitting that the course-sharing provisions of the 1973 and 1974 orders have not been complied with, the Superintendent suggested in his testimony at trial that the course-sharing programs ought to be abolished. The suggestion is grounded in the fact that such sharing is no longer an effective desegregation tool in Zone 1 because Sweetwater High School is now majority black, and because the opening this year of the countywide vocational center in Linden and the subsequent transportation considerations raised by it make the continuation of the sharing both economically and logistically infeasible.

The opening of the vocational center will require the transportation of many students at all county schools to Linden at various times of the day and then return them to their respective schools later. The availability of buses for this endeavor

will seriously hamper efforts to share courses, since Marengo High is eight miles from Sweetwater and Marengo County is one mile from Johnson, both requiring bussing. The scheduling and transportation problems involved in continued sharing would appear to be insurmountable.

D. **Faculty Assignment**

19. Under this contention, the government has alleged that the Board assigns its faculty to schools so as to reflect the race of students in attendance at each school in violation of prior orders of this Court and the three judge panel respecting faculty assignments. The terminal order of the three judge panel entered June 20, 1970, in adopting the plan proposed by HEW, provided, in pertinent part, that:

> 1. The principals, teachers, teacher-aides and other staff who work directly with children at a school shall be so assigned that in no case will the racial composition of a staff indicate that a school is intended for Negro students or for White students. The district shall assign the staff described above so that the ratio of Negro to White teachers in each school, and the ratio of other staff in each, are substantially the same ratio as to the teachers and other staff, respectively, in the entire school system. . . .

20. Reports from the Marengo County Board of Education (intervenor's Exhibits 26-36) reveal the following figures with respect to student assignment in the Marengo County School System:

ZONE 1

	Marengo			Sweetwater			Total		
	B	W	%	B	W	%	B	W	%
March 1974	963	0	100/0	155	536	22/78	1118	536	68/32
October 1974	739	0	100/0	632	485	43/57	1101	485	70/30
March 1975	763	0	100/0	364	475	43/57	1127	475	70/30
October 1975	720	0	100/0	423	437	49/51	1143	437	72/28
March 1976	731	0	100/0	425	440	49/51	1156	440	72/28
October 1976	739	0	100/0	433	452	49/51	1172	452	72/28
March 1977	748	0	100/0	436	460	49/51	1184	460	72/28

ZONE 2

	Marengo Co.			Amelia Johnson			Total		
	B	W	%	B	W	%	B	W	%
March 1974	67	311	18/82	674	0	100/0	741	311	70/30
October 1974	173	303	37/63	673	0	100/0	846	303	74/26
March 1975	191	304	39/61	695	0	100/0	886	304	74/26
October 1975	169	328	34/66	694	0	100/0	863	328	72/28
March 1976	170	342	33/67	701	0	100/0	871	342	72/28
October 1976	142	315	31/69	678	0	100/0	820	315	72/28
March 1977	143	322	31/69	690	0	100/0	833	322	72/28

ZONE 3

	John Essex		
	B	W	%
March 1974	632	0	100/0
October 1974	613	0	100/0
March 1975	520	0	100/0
October 1975	533	0	100/0
March 1976	506	0	100/0
October 1976	436	1	100/0
March 1977	441	1	100/0

The reports reflect that Marengo High in Zone 1, Marengo County Training (Amelia Johnson) in Zone 2, and John Essex in Zone 3 are all-black schools and have been since the 1974 orders, while Sweetwater and Marengo County High Schools, white schools under the *de jure* dual system, remain majority white.[16]

21. The same reports reveal the following breakdown by race of faculty members during the same period:

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[16] The Marengo County Superintendent is of the opinion that Sweetwater is now majority black (Testimony of Fred Ramsey on 5-8-78, Transcript at p. 14). While this may be true for the 1977-78 school year, it is not indicated by any of the records presently before the Court.

Zone 1

	Marengo			Sweetwater			Total		
	B	W	%	B	W	%	B	W	%
March 1974	Not Available[17]						57	28	67/33
October 1974	Not Available						52	30	63/37
March 1975	Not Available						53	30	64/36
October 1975	36	1	97/3	17	29	37/63	53	30	64/36
March 1976	37	0	100/0	17	29	37/63	54	29	65/35
October 1976	37	0	100/0	17	29	37/65	54	29	65/35
March 1977	37	0	100/0	17	28	38/62	54	28	66/34

Zone 2

	Marengo County			Amelia Johnson			Total		
	B	W	%	B	W	%	B	W	%
March 1974	Not Available[18]						41	17	71/29
October 1974	Not Available						44	21	68/32
March 1975	Not Available						44	21	68/32
October 1975	7	20	26/74	37	0	100/0	44	20	69/31
March 1976	7	20	26/74	37	0	100/0	44	20	69/31
October 1976	6	21	78/22	37	0	100/0	43	21	67/33
March 1977	6	21	78/22	37	0	100/0	43	21	67/33

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[17] The Board listed only the total number of teachers at Coxheath, Sweetwater, and Marengo High without an individual breakdown until the Board report of October, 1975.

[18] The Board reported only the total number of teachers at Marengo County High and Johnson High without an individual breakdown until the report of October, 1975.

Zone 3

	John Essex		
	B	W	%
March 1974	26	5	84/16
October 1974	28	4	87/13
March 1975	28	4	87/13
October 1975	27	5	86/14
March 1976	27	5	86/14
October 1976	25	3	89/11
March 1977	25	3	89/11

A simple viewing of figures would tend to indicate that Marengo High, Johnson High, and John Essex, traditionally black under the *de jure* segregated system, remain identifiable as black schools by the composition of their faculties. Similarly, the figures with respect to Sweetwater High and Marengo County High indicate that these traditionally white schools are still identifiable as such. This alone violates the terms of the 1970 terminal order. Additionally, however, the figures reveal a violation of the second portion of the assignment provisions in that it is clear that no effort has been made to make the ratio of blacks to white at each school substantially similar to the ratio of the system as a whole. The existence of two schools with predominately white faculties in a system that has a 70%/30% black faculty to white faculty ratio is sufficient to negate any argument that the Board has complied.

One of the major reasons underlying this violation of the terminal order has been the lack of adequate supervision by the Board. In questions of faculty assignment, the Board gives a great deal of responsibility to the principals at each school and to the local trustees (Ramsey Deposition, intervenor's Exhibit 18, at pp. 26-28). The principal or the trustees recommend to the Superintendent, who passes the recommendations on to the Board. Such recommendations are generally accepted by the

Board. While this process itself is not improper, the Board's usage of it to evade the requirements of the 1970 terminal order certainly is.

Conclusions of Law

1. This Court has jurisdiction over the subject matter of this lawsuit and the parties hereto by virtue of Title 42, U.S.C.A., §§ 1983 and 2000a-6. As with the Findings of Fact above, considerations of clarity and conciseness dictate that the Conclusions of Law with respect to each issue be entered separately.

A. **Transportation**

2. The Court is of the opinion that the defendant Board is in violation of prior orders of this Court respecting the transportation of students in at least three respects. First, the evidence has made it clear that buses serving Marengo County High School in Zone 2 are crossing attendance zone lines and transporting to that school students who should properly be attending John Essex in Zone 3. Additionally, it is clear that Zone 1 buses are picking up Zone 2 students in the Magnolia, Hampdon, and Moores Valley area and transporting them to Marengo High School in Zone 1. The crossing of zone lines is in direct violation of prior orders of this Court and cannot be continued.[19] A second area of violation results from the segrega-

[19] The Court notes that not only has the Board been guilty of failing to respect the attendance zone lines, but further does not believe the Court meant what it said when the lines were drawn. Testimony of the Superintendent (Ramsey Deposition, intervenor's Exhibit 18, at pp. 7-8) indicates that he did not conceive of there being any specific boundaries in the county system and that student assignment was based on tradition, with students in any given area attending the school that has always served that area. However, in view of the remedy adopted, *infra*, rescinding the use of zone lines, the Court notes that such violations will not be able to occur in the future.

tion of students on the school bus driven by Ruth Allen. It is inconceivable that a bus route in a system that is 80% black could, without preconceived effort, have all white passengers. Since transportation is a basic component of education in rural counties such as Marengo County, the Court is convinced that all students must be transported on a nonsegregated and otherwise nondiscriminatory basis. *See Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211, 1218 (5th Cir. 1970). A final violation revealed by the evidence relates to the overlapping of bus routes in both Zones 1 and 2. It is clear that in Zone 1, the buses travel many miles more than is necessary, since the Sweetwater routes cover all of the attendance zone and the Marengo routes do the same. The apparent intent behind the extensive routes is to achieve minimal desegregation on some buses, leaving most others all black (*See, e.g.,* Alexander Deposition, intervenor's Exhibit 9, at p. 12; Kimbrough Deposition, intervenor's Exhibit 17, at p. 6). It is clear that but for these overlapping routes there would be no all-black schools in Marengo County.[20]

B. Course-Sharing

3. The findings of fact set out above demonstrate clearly that the defendant Board has made no substantial effort at compliance with prior court orders dealing with course-sharing, but

[20] Whether the white students would attend the majority black schools is a separate question which, in light of this Court's experience with the Wilcox County School System, would most probably be answered in the negative. *See United States v. Wilcox County Board of Education,* Civil Action No. 3934-65-H (S.D. Ala.). Thus the Court faces limited options: some desegregation through artificial maintenance of majority white schools in a majority black system; or complete segregation to the extent that the system will have only black students. In view of the prevailing law in the Fifth Circuit, *e.g., Lee v. Tuscaloosa City School System,* slip no. 5179 (5th Cir., June 19, 1978), the first alternative is no longer open to this Court since the maintenance of such schools precludes a unitary system.

rather have implemented programs aimed at results not intended by this Court. Beyond this, it appears from the Superintendent's testimony that future course-sharing would be impractical in light of the opening of the area vocational center. In view of this, and in view of the remedy adopted witth respect to student assignment, *infra,* the Court is of the opinion that these violations need not be remedied, and that past orders of this Court requiring such sharing are due to be and the same are hereby RESCINDED.

C. Faculty Assignment

4. There is no question but that the faculty assignment portion of the 1970 terminal order has not been complied with to the extent that the Board appears to have engaged in racially motivated considerations in making its assignments. Such procedures, intentional or otherwise, violate the terminal order and the dictates of *Singleton v. Jackson Municipal Separate School System,* 419 F.2d 1211, 1218 (5th Cir. 1970), and must be remedied.

REMEDY

The Findings of Fact and Conclusions of Law set out above have convinced the Court that judicial intervention in the affairs of the Marengo County Board of Education is required. The evidence presented to the Court is conclusive that the Board has done little in complying with the orders of this Court aimed at providing a unitized, desegregated school system. Indeed, the posture of the defendant Board can best be characterized as "obdurately obstinate," an attitude less than novel in this judicial district. *See, e.g., United States v. Wilcox County Board of Education,* 494 F.2d 575, 580 (5th Cir. 1974). Were this strictly a question of this Court weighing the performance of the Board in light of past orders, it would be

simple to conclude that the Board should receive failing marks. However, the Court's task is not so simple, for having concluded that the Board has failed to effectively desegregate its schools, and with the evidence making it patently clear that in the absence of strong and convincing court action no such effective desegregation shall be forthcoming, and in light of the Board's contention that the prior plan is now infeasible, it is incumbent upon this Court to adopt and implement a new plan for the Marengo County schools that can be strictly enforced. Such a conclusion should not be read as an abdication of this Court's view that the 1974 plan was a proper desegregation technique, but rather that the ineffective assistance of the Board has dictated the imposition of new remedial action.

The litigants have been of little aid to this Court in this respect. The Board has continually demonstrated its disinclination to implement effective desegregation policies beyond the superficial program now existing under which all white students and some black students are provided, to some extent, a desegregated education. The government, on the other hand, while recognizing fully the problem confronting the Court, has come forward with a desegregation plan that does not, in this Court's experience, promise to work. Whether it results from animosity between the parties herein or overlitigiousness, the Court is of the opinion that the opposing forces have lost sight of the ultimate question, the fundamental right to education of school children.

The Court begins its analysis with the fundamental rule that equal educational opportunity in the public schools must be afforded to all children, regardless of their race or color. *Brown v. Board of Education of Topeka,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.2d 873 (1954); *United States v. Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966). The objective sought, and one that this Court is convinced the litigants herein have lost sight of, is to eliminate from all public

schools all vestiges of state-imposed segregation so that all students have an equal opportunity to obtain a nondiscriminatory education. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 402 U.S. 39, 91 S.Ct. 1287, 28 L.Ed.2d 581 (1971); *Green v. County School Board of New Kent County,* 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Monroe v. Board of School Commr's of the City of Jackson,* 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). The burden of effectuating such a desegregated system rests first with the school board, *Bradley v. School Board of the City of Richmond,* 416 U.S. 596, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1973); *Monroe, supra;* but where, as here, the school board has defaulted on its obligation to desegregate its schools, the Court must intervene to preserve fundamental rights. *Dayton Board of Education v. Brinkman,* — U.S. —, 97 S.Ct. 2766, 53 L.Ed. 2d 851 (1977); *Davis v. Board of School Commr's of Mobile County,* 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577 (1971). Accordingly, it again falls upon this Court to effectuate a workable plan for Marengo County.

In developing a desegregation plan the Court is to guided by equitable principles. *Milliken v. Bradley,* — U.S. —, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977), *citing Brown v. Board of Education,* 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (*Brown,* II). Chief Justice Burger, in *Milliken,* required that in applying such equitable principles, the Court be cognizant of three factors:

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and the scope of the constitutional violation . . . The remedy must therefore be related to "the *condition* alleged to offend the Constitution . . ." *Milliken* I, [418 U.S.] at 738, 41 L.Ed.2d 1069, 94 S.Ct. 3112. Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the

> victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746, 41 L.Ed.2d 1069, 94 S.Ct. 3112. Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

— U.S. —, 53 L.Ed.2d at 755-56 (citation and footnotes omitted) (emphasis in original). Beyond this the Court is required to adopt a plan that realistically promises to work. *Davis, supra* at 38, 28 L.Ed.2d at 581, *citing Green, supra* at 439, 20 L.Ed. 2d at 724. The effectiveness of any plan is debatable until some period of time has passed after imposition, but this Court is convinced that hindsight can be just as effective a tool as foresight, so the plan that the Court adopts today, *infra,* is predicated to a great extent upon this Court's experience with desegregation in this and other systems.

Since 1971 this Court has struggled to find a solution to the desegregation problems applicable to Marengo County. Personal visitations have been made to most, if not all, of the educational facilities in the county, so the Court is intimately familiar with the facility capabilities. The attributes and shortcomings of each facility have been noted and the Court has struggled long hours with members of the educational establishment as well as the attorneys in an effort to effectuate a solution. This county is a rural county within the true meaning of that term. Besides the cities of Linden and Demopolis, which have their own city school systems, Thomaston is the largest urban area, having a population of less than 900. Myrtlewood, served largely by the Linden City system, has a population of under 350. Sweetwater has 250 residents, and from there the concentration of population drops dramatically. You can literally ride for miles and not see any evidence of human habitation. The ratio of black to white in the county, as reflected by the student population in the public schools, is 80% black and 20% white. There are

presently six public schools serving the county school children. This demographic situation is crucial in understanding the task confronting the Court in effectuating a remedy in this case.

Before effectuating a remedy, it is incumbent upon the Court to consider the relative efficacy of all available desegregation techniques. *Davis, supra* at 37, 28 L.Ed.2d at 581, *citing Swann, supra* at 22-31, 28 L.Ed.2d at 570-75. The remedies available for this task, as mentioned above, are limited only by what promises realistically to work.

The technique suggested by the government calls for the pairing of schools in Zones 1 and 2. This technique, which seeks to achieve desegregation by combining various grades of various schools, has frequently received endorsement in this judicial circuit. *See, e.g., United States v. Columbus Municipal Separate School District,* 558 F.2d 228 (5th Cir. 1977); *Lee v. Demopolis City School System,* 557 F.2d 1053 (5th Cir. 1977); *United States v. Texas Education Agency,* 512 F.2d 896 (5th Cir. 1975); *Darville v. Dade County School Board,* 497 F.2d 1002 (5th Cir. 1974); *Lee v. Macon County Board of Education,* 448 F.2d 746 (5th Cir. 1971). Indeed, pairing was, to a limited extent, the essence of the remedy ordered in this system by this Court's decrees of 1973 and 1974. That plan was ineffectual largely due to the lack of interest on the part of the School Board. The plan proposed by the government has certain redeeming values, most notably that transportation routes presently in use would not require substantial alteration and that most students would have to go no further to attend schools this years than they did in the past school year. The Court detects only two flaws in the government's plan, but the flaws are of such magnitude that the Court is convinced that such plan does not promise realistically to work, as required by *Davis* and *Green, supra.* The first problem lies in the size and nature of the facilities involved in the proposed pairing. In

Zone 1, the government would house students in grades K-3 (382 students) and 10-12 (378 students) in the Marengo High School facility, with students in grades 4-6 (377 students) attending the Sweetwater High facility and students in grades 7-9 (394 students) attending Sweetwater Junior High (Coxheath). According to the government's capacity figures, the authority for which is uncited, such pairing would result in overcrowded conditions only at Sweetwater Junior High School. What the government fails to assess in its post-trial brief suggesting the pairing, however, is the effect of using the Marengo High facility, ostensibly constructed for grades 1-12, as a K-3 and 10-12 facility. Assuming *arguendo* the validity of the government's capacity figures, the Marengo High facility was constructed with a view toward serving approximately 200 students in grades 10-12. There is no evidence in the record, nor can the Court conclude from its visitation of the facility, that such facility can effectively serve 378 students at those grade levels. The same problem results in Zone 2, where the government seeks to make the Marengo County High School facility, originally built to house grades 1-12, a 10-12 facility. Such pairing would, in the words of the Superintendent, amount to no more than "storing bodies," and would not be in the best interests of sound educational administration. A second, more compelling, problem apparent to the Court is the distinct possibility of white flight in the wake of such pairing. The government's statistics reveal that pairing, even if available in view of the present facilities, would result in each school in Zones 1 and 2 being about 30% white and 70% black. From this Court's experience, *see United States v. Wilcox County Board of Education*, Civil Action No. 3934-65-H (S.D. Ala.), such a student assignment ratio would result in the exodus of a large part, if not all, of the white students from the Marengo County School System. While this Court recognizes that fear of potential "white flight" cannot lie as the basis for failure to effectively desegregate a school system, *United States v. Scotland Neck City Board of*

Education, 407 U.S. 484, 491, 92 S.Ct. 2214, 33 L.Ed.2d 75, 81 (1972), there is no question but that the choice of one constitutional plan over another may be predicated upon an intent to minimize the effects of any white boycott. *Stout v. Jefferson County Board of Education*, 537 F.2d 800, 802 (5th Cir. 1976). The recent teachings of *Regents of the University of California v. Bakke*, 46 U.S.L.W. 4896, 4907-08 (U.S. Sup. Ct., June 28, 1978) indicate the importance of a diverse student body, although that decision is certainly distinguishable as dealing with a medical education as opposed to elementary or secondary education. In any event, before this Court will allow the Marengo County School System to degenerate into a one race system offering white students nothing and black students little more than was available under the dual system, the Court intends to make full use of its powers of experimentation to seek to achieve a desegregated and unitary system in which both races will participate. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 89 S.Ct. 1620, 23 L.Ed.2d 263 (1969). On this basis, and on the probability that pairing would overtax the existing facilities, the Court is of the opinion that the pairing plan suggested by the government is not the appropriate plan.

A second remedial alternative is attendance district zoning. *See Youngblood v. Board of Public Instruction of Bay County*, 430 F.2d 625 (5th Cir. 1970); *Lee v. Macon County Board of Education*, 429 F.2d 1218 (5th Cir. 1970); *Mannings v. Board of Public Instruction of Hillsborough County*, 427 F.2d 874 (5th Cir. 1970); *Ellis v. Board of Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970). This remedy is presently in force in most of the systems within this Court's jurisdiction, *see, e.g., Lee v. Dallas County Board of Education*, Civil Action No. 5945-70-H (S.D. Ala. March 3, 1978), and was the remedy prescribed for the Marengo County System by the terminal order of the three judge panel. The Court consid-

ered this remedy in connection with the matter *sub judice*, and even went so far as to draw tentative sub-zone lines creating two attendance zones in both Zones 1 and 2. The advantages of this remedy would be similar to those made available by the pairing proposal *supra*. Additionally, it is not clear that such a remedy would overtax the facilities to the extent that pairing would. However, since the splitting up of the white students in the two zones would most likely lead to the white exodus mentioned above, the Court cannot reasonably accept this plan any more than it would accept pairing as a plan that realistically promises to work.

The Court conceives of each of the foregoing desegregation tools as efforts at social engineering. Social engineering under the demographic circumstances presently existing in Marengo County will not work because not only do you close the system to a large number of students who desire and need a public education, but you provide the basis for the disestablishment of the public school system as a whole since you remove a necessary underpinning of that system—public support. Whoever conceived the idea of social engineering in the education area could not have possible conceived the ultimate result as being the abolition of public education for the white race and the establishment of all-black schools. It is not practical to give each school in an 80% black system a sprinkling of whites in order to be able to say social engineering works and each school is integrated. You can say that the schools are desegregated, however, by giving each student an equal opportunity to obtain an equal education.

The ultimate solution to the desegregation efforts in Marengo County is the establishment of a central system in the county to which all students shall be assigned. Indeed, this was an alternative proposed by the Board in the early 1970's. The problem with this is that Marengo County is not a rich county and cannot undertake this endeavor unaided. Therefore, the Court

is convinced that if social engineering is to be allowed to take its course in Marengo County then a central facility must ultimately be established at such time as the United States government, which appears to be the only party having objections to the past efforts of the Marengo County School Board, provides financial assistance to the state and county to make such construction feasible. The Court suspects that such contribution will be a long time coming. However, in the interest of speeding up the day when a county wide facility can be constructed, the Court hereby orders the defendant Board to come forward with a plan by no later than November 17, 1978, by which such a facility might be constructed and a report reflecting the results of its efforts at obtaining the necessary funding.

Until a central facility can be constructed the Court elects to take a constitutional approach to the problem—all students presenting themselves to the educational processes of Marengo County shall have an equal opportunity to obtain an education of equal quality to that of any other students in the system which the Board must provide at any institution or establishment that they elect to attend that the School Board can presently afford to operate. This remedy is pure and simple freedom of choice, which, when combined with completely desegregated faculties, desegregated transportation facilities, and facilities maintained on a nondiscriminatory basis, should combine to provide each student with an educational opportunity equal to that of each and every other student within the system. This possible novel approach today in this system will have no deleterious effect on the desegregation efforts elsewhere for the reason that if not adopted the system will end up an all one race system as in Wilcox County where blacks now are bussed 100 miles from an all-black area to an all-black school.

The freedom of choice plan has enjoyed considerable disrepute in the past ten years, commencing with *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct.

1689, 20 L.Ed.2d 716 (1968), and its companion cases, *Raney v. Board of Education of the Gould School District*, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 729 (1968), and *Monroe v. Board of Commissioners of the City of Jackson*, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). In *Green*, the Court did not hold freedom of choice unconstitutional, but found rather that it was impermissible only to the extent that it failed "to undo segregation." 391 U.S. at 440, 20 L.Ed.2d at 725. The Court noted that such plans had been largely ineffective as a desegregation tool, but opined that "there may well be instances in which it can serve as an effective device." *Id.* The words of Justice Brennan, speaking for an unanimous Court, are quite instructive:

> Where it offers a real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary nonracial school system, "freedom of choice" must be held unacceptable.

Id. at 440-41, 20 L.Ed.2d at 725. Since this Court is convinced that any other desegregation technique promises only a white boycott of the public school system in Marengo County and a return for black students to a system not substantially different from that afforded them under the dual system, the Court is of the opinion that freedom of choice ought to be implemented in Marengo County so that its effectiveness as a desegregation tool may be properly assessed. In view of the past lack of cooperation that this Court has received from the Board, the plan will have to be tightly monitored, but the Court is confident that proper safeguards can be afforded.

Accordingly, it is the order of this Court that, commencing with the 1978-79 school year, and for each year thereafter until directed otherwise by this Court or until the completion of a central facility, each student attending schools within the Marengo County School System shall attend the school of his choice, up to facility capacities. All zone lines previously drawn by this Court are hereby abolished, and the Board will provide to each student requisite transportation to the facility of that student's choice. The Board will mail to each student a form listing the schools which may be attended, and each student shall return the form to the Board listing a first, second, and third choice. The following capacity limits will be observed in each school:

School	Grades	Capacity
Marengo High School	K-12	780, 60 per grade
Sweetwater High School	1-6, 10-12	540, 60 per grade
Coxheath Junior High	7-9	270, 90 per grade
Johnson High School	K-12	845, 65 per grade
Marengo County High	K-12	390, 30 per grade
John Essex High School	K-12	585, 45 per grade

The Court expects that this plan will lead to somewhat of an inverse white flight in that most elections by students will be racially motivated. Such elections may well result in any of the schools receiving more elections than its facility can maintain. In the event this occurs, the names of students selecting that particular facility will be drawn at random during a meeting of Board and government attorneys. Those students not afforded their first choice will be placed in the pool of applicants for their second choice, and so on. Any conduct by the Board, or any of its agents, which might encourage any student to opt for one school as opposed to any other will be deemed a violation of this order. After the first year that the program has been in effect, a student will continue to attend the school chosen this year, with Coxheath Junior High and Sweetwater High School to be considered one school for this purpose.

With respect to faculty assignments, the Board is hereby ordered, under penalty of contempt, to comply with prior orders of this Court so that the racial balance of the faculty and staff at each school in the system is the same. As was the case previously, any teacher refusing a transfer may be required to seek employment elsewhere. On this point, the Board is hereby ORDERED to report to the Court immediately upon receipt of this decision its proposed faculty assignments for the 1978-79 school year, and the Board may expect court ordered transfers if the assignments are not in compliance with prior orders.

Finally, with respect to transportation, the Court orders the Board to come forward with a desegregated, nondiscriminatory transportation plan for the bussing of students. The Court does not expect to find any all-white buses in the system without a compelling explanation, and the Board is ordered to end its practice of overlapping its routes to so segregate its buses. Any violation of this order will be dealt with sternly. Such plan should be filed with the Court as soon as possible, so that it may be approved for the coming school year.

All prior orders of this Court not touching on student assignment, including majority to minority transfer provisions, remain in full force.

The Board is hereby directed to report to the Court within two weeks of receipt of this decision the form to be used by the Board in eliciting the school selections from the students. Thereafter the Board is to provide the Court with a breakdown showing the number of elections, by grade, made for each school. The Board is reminded that any default on its part, or on the part of its agents, with respect to this desegregation plan will subject the Board to the contempt powers of this Court, and the Court intends to carefully monitor this program so that freedom of choice does not become illusory. *C.f., United States v. Jefferson County Board of Education,* 372 F.2d 836 (5th Cir. 1966).

The Court will hold a hearing on this matter at 9:00 a.m. on Friday, August 25, 1978, in the United States Courthouse, Selma, Alabama, at which time the Court will consider any suggestions the parties may have to further the purposes of this program, and at which time the Court will expect to hear from the Board on its progress thus far.

DONE this 7th day of August, 1978.

/s/ W. B. HAND
United States District Court

U. S. Dist. Court
Sou. Dist. of Ala.

Filed and Entered This the
7th Day of August, 1978

Minute Entry No. 47,012

WILLIAM J. O'CONNOR, Clerk

By: /s/ G. WALTER
Deputy Clerk

APPENDIX C

In the United States District Court for the
Southern District of Alabama
Northern Division

Anthony T. Lee, et al., Plaintiffs, United States of America, Plaintiff-Intervenor, National Education Association, Inc., Plaintiff-Intervenor, Marengo County Board of Education, et al., Defendants.	Civil Action No. 5945-70-H

Notice of Appeal

Notice is hereby given that the United States of America, plaintiff-intervenor herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from this Court's judgment entered herein on August 7, 1978.

Respectfully submitted,

JAMES P. TURNER
Deputy Assistant Attorney General

/s/ BURTIS M. DOUGHERTY
JOSEPH D. RICH
BURTIS M. DOUGHERTY
JOSHUA P. BOGIN
Attorneys
Department of Justice
Washington, D.C. 20530

WILLIAM A. KIMBROUGH
United States Attorney

Certificate of Service

I hereby certify that I have served a copy of the foregoing Notice of Appeal to the below-named counsel of record by depositing a copy in the United States mail, postage prepaid, addressed as follows:

Solomon S. Seay, Jr., Esquire
Gray, Seay & Langford
352 Dexter Avenue
Montgomery, Alabama 36104

Hugh A. Lloyd, Esquire
Lloyd, Dinning & Boggs
Post Office Drawer Z
Demopolis, Alabama 36732

This the 14th day of August, 1978.

/s/ Burtis M. Dougherty
Burtis M. Dougherty
Attorney
Department of Justice
Washington, D. C. 20530

APPENDIX D

In the
United States Court of Appeals
For the Fifth Circuit

No. .....

Anthony T. Lee, et al.,
Plaintiffs,

United States of America,
Plaintiff-Intervenor-Appellant,

National Education Association, Inc.,
Plaintiff-Intervenor,

v.

Marengo County Board of Education,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama
Northern Division

Motion for Summary Reversal

The United States, plaintiff-intervenor-appellant, hereby respectfully moves this Court to summarily reverse the August 7, 1978 judgment of the court below ordering the immediate implementation of a freedom of choice attendance plan by the Marengo County School System. As grounds for this Motion, the United States shows the following:

1. On August 7, 1978, the United States District Court for the Southern District of Alabama (W. B. Hand, J.) entered its Findings of Fact, Conclusions of Law, and Judgment in the above-captioned matter. The district court concluded that the

defendant Marengo County Board of Education has continued to operate its schools in a constitutionally infirm manner, in violation of that court's order of September 6, 1974. The court specifically found violations relating to student assignment, faculty assignments, and transportation of students.

2. Regarding the teacher assignment and transportation violations, the court ordered the defendant to implement immediately *Singleton**-type provisions relating to assignment of teachers and staff, and "to come forward with a desegregated, nondiscriminatory transportation plan for the bussing of students." *Lee v. Marengo County Board of Education*, C.A. No. 5945-70-H at 37 (S.D. Ala. Aug. 7, 1978) [hereinafter referred to as Order]. The United States does not appeal from those portions of the Order. However, in addressing the defendant's violation regarding the assignment of students, the district court rejected a proposed pairing plan offered by the United States and instead directed immediate implementation of a remedy which it characterized as "pure and simple freedom of choice." *Id.* at 34.

3. On August 15, 1978, the United States filed a timely notice of appeal from the district court's judgment.

4. The law and the record in this case make manifest the conclusion that a freedom of choice plan cannot and will not effectively dismantle the dual system which still prevails in the Marengo County schools, and that practical, effective, alternative desegregation remedies exist which should be immediately implemented in this distict. *Alexander v. Holmes County Board of Education*, 396 U.S. 19 (1969); *Green v. County School Board*, 391 U.S. 430 (1968); *Raney v. Board of Education*, 391 U.S. 443 (1968); *Singleton, supra.* Further, it is clear

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* *Singleton v. Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1969), *rev'd on other grounds sub nom. Carter v. West Feliciana Parish School Board*, 396 U.S. 390 (1970).

that the court below impermissibly devised its freedom of choice plan "with the fear of white flight as its paramount consideration." *United States v. DeSoto Parish School Board*, 574 F. 2d 804, 816 (5th Cir. 1978).

5. The United States, believing that time is of the essence in this matter (the 1978-79 school year is scheduled to begin in Marengo County on August 28, 1978), that the fundamental constitutional rights of the school children of Marengo County are in jeopardy for yet another school year, and that this appeal presents no "new issue even resembling a constitutional issue in this much litigated field," respectfully moves this Court for summary reversal of that part of the district court's order relating to student assignment. *United States v. Hinds County School Board*, 417 F. 2d 852, 857 (5th Cir. 1969); *Groendyke Transport, Inc. v. Davis*, 406 F. 2d 1158, 1161-63 (5th Cir. 1969). See *Isbell Enterprises, Inc. v. Citizens Casualty of N.Y.*, 431 F. 2d 409 (5th Cir. 1970); *Murphy v. Houma Well Service*, 409 F. 2d 804, 805-08 (5th Cir. 1969); Fifth Circuit Rule 18.

6. In the event the Court elects not to grant summary reversal prior to the opening of school on August 28, 1978, we request the Court to enter an order directing the continued operation of the Marengo County school system in accordance with the 1974 Order of the court below pending a final ruling on this appeal.

7. The basis of this motion is more fully set out in the attached memorandum, which is incorporated herein.

WHEREFORE, the United States respectfully urges this Court to enter immediately an order reversing the district court's judgment of August 7, 1978 insofar as it relates to student assignment, and directing the implementation, effective with the commencement of the 1978-79 school year, of the proposed

desegregation plan of the United States, the only constitutionally acceptable plan in the record of this case.

Respectfully submitted,

JAMES P. TURNER
Acting Assistant Attorney General

WILLIAM A. KIMBROUGH
United States Attorney

/s/ JOSHUA P. BOGIN
WALTER W. BARNETT
FRANZ R. MARSHALL
BURTIS M. DOUGHERTY
JOSHUA P. BOGIN
Attorneys
Department of Justice
Washington, D. C. 20530

APPENDIX E

In the United States Court of Appeals
for the Fifth Circuit

No. 78-2787

Anthony T. Lee, et al., Plaintiffs,
United States of America, Plaintiff-Intervenor-Appellant,
National Education Association, Inc., Plaintiff-Intervenor,

v.

Marengo County Board of Education, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama
Northern Division

MOTION TO DISMISS APPEAL

Marengo County Board of Education, Defendant-Appellee, respectfully moves this Court to dismiss the appeal heretofore filed by the United States, Plaintiff-Intervenor, from Judgment of the United States District Court for the Southern District of Alabama, Northern Division, rendered in this cause on August 7, 1978. As grounds for this Motion, the Marengo County Board of Education shows as follows:

1. The Court of Appeals is without jurisdiction of this cause under 28 USCA Section 1291.

2. The said Judgment of August 7, 1978 is interlocutory in nature, is not a final decision, and is therefore not subject to appeal.

3. This action was initiated by Petition for Further Relief filed by Plaintiff United States of America and the Order appealed from was entered based on issues decided in the Plaintiff's favor.

The basis for this Motion is set out in the attached Brief which is incorporated herein.

Respectfully submitted,

/s/ H. A. LLOYD
H. A. LLOYD
LLOYD, DINNING & BOGGS
Post Office Drawer Z
Demopolis, Alabama 36732
Attorneys for Defendants-Appellees,
Marengo County Board of
Education

Certificate of Service

I do hereby certify that I have on this 7th day of September, 1978, served a copy of the foregoing pleading on Counsel for all parties to this proceeding by mailing the same by United States mail properly addressed and first class postage prepaid.

/s/ H. A. Lloyd
Lloyd, Dinning & Boggs
P. O. Drawer Z
Demopolis, Alabama 36732
Attorneys for Defendants-Appellees,
Marengo County Board of
Education

APPENDIX F

Lee v. United States

Anthony T. Lee, et al.,
Plaintiffs,

United States of America,
Plaintiff-Intervenor-Appellant,

National Education Association, Inc.,
Plaintiff-Intervenor,

v.

Marengo County Board of Education, et al.,
Defendants-Appellees.

No. 78-2787.

United States Court of Appeals,
Fifth Circuit.

Feb. 5, 1979.

In a school desegregation case, the United States appealed from a portion of the order of the United States District Court for the Southern District of Alabama at Selma, William Brevard Hand, J., and moved for summary reversal. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) an order denying injunctive relief sought by the Government as to student assignment was an appealable order, and (2) where it was clear that freedom-of-choice student assignment had not worked in the county public school system insofar as desegregation was concerned, no effective result having followed the District Court's earlier order which had directed implementation of a freedom-of-choice student assignment plan, it was necessary to remand for further consideration and evidentiary hearing if necessary

and to offer the county board of education opportunity to file a student assignment plan constitutionally acceptable.

Reversed and remanded.

1. **Schools and School Districts Key 13(21)**

Where it was clear that freedom-of-choice student assignment had not worked in county public school system insofar as desegregation was concerned, no effective result having followed court's order which had directed implementation of freedom-of-choice student assignment plan, it was necessary to remand for further consideration and evidentiary hearing if necessary and to offer county board of education opportunity to file student assignment plan constitutionally acceptable.

2. **Federal Courts Key 558**

Order denying injunctive relief sought by Government as to student assignment in school desegregation case was an appealable order. 28 U.S.C.A. §§ 1291, 1292(a).

Appeal from the United States District Court for the Southern District of Alabama.

Before AINSWORTH, GODBOLD and HILL, Circuit Judges.

AINSWORTH, Circuit Judge:

This is an appeal by the United States from that portion of the district court's order dated August 7, 1978 which pertains to student assignment in the public school system of Marengo County, Alabama. The district court's order is comprehensive

in numerous phases of the desegregation process in the county's school system which relate not only to student assignment but also to faculty assignment, transportation, school construction and site selection and majority to minority transfer. The Government has moved for summary reversal of the district court's order as it pertains to student assignment, its principal objection being to that portion of the order which directs implementation of a freedom-of-choice student assignment plan.

The defendant, Marengo County Board of Education, has filed a motion for dismissal of the appeal of the United States on the ground that the district court's order is not an appealable order, is interlocutory and not a final decision, and this court is therefore without jurisdiction under 28 U.S.C. § 1291. We expedited the case and have duly heard oral argument.

As the Government points out in its brief, historically this case arises out of the original lawsuit, *Lee v. Macon County Board of Education*, 221 F.Supp. 297 (M.D.Ala.), filed in 1963, which involved the constitutionality of the segregated school systems throughout the State of Alabama. The matter was then before a three-judge court which authorized freedom of choice as a proper tool of desegregation. However, following the Supreme Court's decision in *Green v. County School Board*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)[1] which cast doubt upon the effectiveness of freedom-of-choice plans, further hearings were held and an order was issued June 12, 1970 which adopted the proposed plan by the Government for use in the 1970-71 school year. Shortly thereafter, on June 19, 1970, the case was transferred from the three-judge court to the district court for the Southern District of Alabama. When the district

[1] *See also Raney v. Board of Education of Gould School District*, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed. 2d 733 (1968), and *Alexander v. Holmes County Board of Education* 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969).

court then modified the order again permitting freedom of choice, we vacated the order and remanded the case on June 14, 1971 directing compliance with the principles established in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L.Ed.2d 554 (1971). *See* 443 F.2d 1367 (5 Cir. 1971). The case was again before us in 1972, when we reversed and remanded the matter for implementation of a workable plan. *See* 465 F.2d 369 (5 Cir. 1972). Thus the present order appealed from represents the third time this case is before us on the issue of student assignment.

Marengo County has a small rural school system, largely black, with approximately 80% black students and 20% white students. Following oral argument, at our direction the Marengo County Board submitted attendance figures for the past three years in the school system. Those for the current school year are included, having been compiled one month (on September 22, 1978) after school convened for the present school year. They are reproduced in the margin.[2]

[2]

1976-1977

	K-6			7-12		
SCHOOL	Black	White	% Black	Black	White	% Black
Sweet Water High	309	216	59	129	233	36
Marengo County Hi	132	176	43	13	138	9
A. L. Johnson High	307	0	100	380	0	100
John Essex High	203	0	100	238	1	100
Marengo High	858	0	100	388	0	100

1977-1978

	K-6			7-12		
SCHOOL	Black	White	% Black	Black	White	% Black
Sweet Water High	309	214	59	126	214	37
Marengo County Hi	128	174	42	12	157	7
A. L. Johnson High	271	0	100	378	0	100
John Essex High	181	0	100	232	0	100
Marengo High	368	0	100	381	0	100

The statistics graphically indicate that the presently court-ordered freedom-of-choice assignment plan is not working to achieve desegregation, and that a majority of the schools in the system are entirely black while the others are predominantly white. This condition has been true throughout the three-year period shown in the statistical summary in footnote 2 *supra*. Essentially the same condition has existed throughout the history of the school system since the first attempts at desegregation by court action. The district court in its recent order of August 7, 1978 observed:

> The Findings of Fact and Conclusions of Law set out above have convinced the Court that judicial intervention in the affairs of the Marengo County Board of Education is required. The evidence presented to the Court is conclusive that the Board has done little in complying with the orders of this Court aimed at providing a unitized, desegregated school system. Indeed, the posture of the defendant Board can best be characterized as "obdurately obstinate," an attitude less than novel in this judicial district.

We agree with the district judge in this regard. Thus the segregated status of the school system is clearly the result of discrimination on the part of the Board, both past and present. We are aware of the difficulty involved in desegregating this school system, and certainly the district judge deserves high marks for his efforts in the matter. Nevertheless, we disagree with the conclusion he has reached.

1978-1979 (as of 9-22-78)

	K-6			7-12		
SCHOOL	Black	White	%Black	Black	White	%Black
Sweet Water High	285	181	61	164	193	46
Merango County Hi	94	133	41	15	122	11
A. L. Johnson High	274	0	100	340	0	100
John Essex High	183	0	100	220	0	100
Merango High	365	0	100	378	0	100

In his order the district judge quotes from *Green v. County School Board*, 391 U.S. 430, 440-41, 88 S.Ct. 1689, 1696, 20 L.Ed.2d 716 (1968), a passage from Mr. Justice Brennan's opinion therein which is "instructive" in the present case. The quotation follows:

> Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, "freedom of choice" must be held unacceptable.

[1] It is clear that freedom-of-choice student assignment has not worked in the Marengo County Public School System insofar as desegregation is concerned. The court's order appealed from in the instant case produced no effective result, as the student enrollment figures for the present school year furnished us by the Board amply demonstrate. Accordingly, the motion of the United States for summary reversal is granted.[3]

[2] The motion of the defendant Board for dismissal of the appeal is denied. The district court's order is appealable under 28 U.S.C. § 1292(a) since the district court denied the injunctive relief sought by the Government as to student assignment.

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[3] On other occasions this court has refused to approve freedom-of-choice plans. The Government has cited as examples, cases to this effect, as follows: *United States v. DeSoto Parish School Board*, 5 Cir., 1978, 574 F.2d 804; *Harkless v. Sweeny Independent School District*, 5 Cir., 1977, 554 F.2d 1353; *Lemon v. Bossier Parish School Board*, 5 Cir., 1971, 446 F.2d 911; *Singleton v. Jackson Municipal Separate School District*, 5 Cir., 1969, 419 F.2d 1211; *Hall v. St. Helena Parish School Board*, 5 Cir., 1969, 417 F.2d 801, *cert. denied*, 396 U.S. 904, 90 S.Ct. 218, 24 L.Ed.2d 180 (1970).

Under the circumstances, we are obliged to remand this case to the district court for further consideration and an evidentiary hearing if that be necessary. The court shall forthwith enter an order directing that the Marengo County Board of Education file a student assignment plan within thirty days which is constitutionally acceptable. Should the Board fail to file a plan within the time limit prescribed, the district court will have no alternative but to order implementation of the plan proposed by the United States—to be implemented in the next school year.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

APPENDIX G

In the
Supreme Court of the United States

No. .....

Marengo County Board of Education,
Petitioner,

v.

Anthony T. Lee,
Plaintiff,

United States of America,
Plaintiff-Intervenor,

National Education Association, Inc.,
Plaintiff-Intervenor,
Respondents.

Certificate of Service

I, H. A. Lloyd, one of the Attorneys for Marengo County Board of Education, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that one the —— day of May, 1979, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to W. A. Kimbrough, Jr., Esquire, United States Attorney for the Southern District of Alabama, P. O. Drawer E, Mobile, Alabama; and by mailing a copy in a duly addressed envelope, with postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530; and by mailing a copy in a duly addressed envelope,

with postage prepaid, to Burtis M. Dougherty, Esquire, Attorney of Record for Plaintiff-Intervenor, Department of Justice, Washington, D. C. 20530.

2. On Anthony T. Lee, et al., Plaintiffs, and on National Education Association, Plaintiff-Intervenor, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to its Attorney of Record, Solomon S. Seay, Jr., Esquire, Gray, Seay & Langford, 352 Dexter Avenue, Montgomery, Alabama 36104.

/s/ H. A. LLOYD
P. O. Drawer Z
Demopolis, Alabama 36732
Attorney for Petitioner,
Marengo County Board of Education

No. 78-1673

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARENGO COUNTY BOARD OF EDUCATION, PETITIONER

v.

ANTHONY T. LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1673

MARENGO COUNTY BOARD OF EDUCATION, PETITIONER

v.

ANTHONY T. LEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a small rural school district in Alabama, seeks review of a court of appeals decision requiring it to desegregate its five schools, three of which have student bodies that are 100% black, one of which has a student body that is predominantly white, and one of which is approximately equally divided between black and white students (Pet. App. A-64 n.2). Since the court of appeals' decision correctly implemented well-established legal principles, there is no reason for further review by this Court.

1. Although this litigation began as part of a lawsuit challenging the constitutionality of the segregated school systems throughout the State of Alabama (Pet. App. A-62),[1] in June of 1970 the three-judge court adopted a final order requiring petitioner to desegregate, and it then transferred the case to the United States District Court for the Southern District of Alabama (Pet. App. A-15). When the district court modified the order of the three-judge court to permit freedom-of-choice enrollment, the court of appeals vacated its order and remanded the case (Pet. App. A-62 to A-63). After a second appeal and remand, for the implementation of a workable desegregation plan, the district court entered an order finding that the school system had been desegregated since at least 1973 (Pet. App. A-20). The government then moved for supplemental relief, and the district court entered its current order (Pet. App. A-20). The district court found that petitioner had been " 'obdurately obstinate' " in failing to comply with previous court orders to desegregate its schools (Pet. App. A-39), and concluded (Pet. App. A-40) that "in the absence of strong and convincing court action no * * * effective desegregation shall be forthcoming." Nonetheless, the court ordered the adoption of a freedom-of-choice plan as the sole student assignment remedy, without making any finding that this

[1]See *Lee* v. *Macon County Board of Education*, 221 F. Supp. 297 (M.D. Ala. 1963).

remedy would accomplish actual desegregation, and despite the availability of alternate remedies, including zoning and pairing (Pet. App. A-43 to A-49).[2]

2. The court of appeals summarily reversed in an opinion upon which we rely (Pet. App. A-60 to A-66). The court concluded (Pet. App. A-65) that under *Green* v. *County School Board*, 391 U.S. 430 (1968), freedom of choice is a permissible desegregation remedy only when it promises to be effective. Finding that virtually no change in student attendance patterns had occurred following the implementation of the district court's freedom-of-choice plan, the court of appeals held "[i]t is clear that freedom-of-choice student assignment has not worked" in petitioner's school system (*ibid.*). Accordingly, it remanded the case to the district court to permit that court to enter an effective desegregation plan (Pet. App. A-65 to A-66).

3. In view of the foregoing, petitioner errs in suggesting (Pet. 11-14) that the court of appeals improperly substituted its judgment for that of the district court. The court of appeals correctly concluded (Pet. App. A-65 quoting *Green* v. *County School Board*, *supra*, 391 U.S.

[2]Because of its conclusion that ultimately the only feasible remedy was the construction of a single centralized school facility, the court also ordered petitioner to present a plan for such a county-wide facility including the possible sources of funding (Pet. App. A-47). The district court clearly indicated, however, that it did not intend to require petitioner—which it stated "is not a rich county and could not undertake this endeavor unaided" (Pet. App. A-46)—to construct such a facility. To the contrary, the court stated its expectation that "a central facility must ultimately be established at such time as the United States government * * * provides financial assistance to the state and county to make such construction feasible" (Pet. App. A-47).

at 440-441) that freedom of choice was not an acceptable remedy in this case because it did not offer " 'real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, nonracial system.' " The district court did not find otherwise.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979

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[3]There is no merit to petitioner's assertion (Pet. 14-16) that the decision below conflicts with other Fifth Circuit decisions or the decisions of other courts. Of the cases relied upon by petitioner, only *Singleton* v. *Jackson Municipal Separate School District*, 419 F. 2d 1211 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970), involved a freedom-of-choice plan. There the court of appeals approved freedom of choice for the west bank schools of St. John the Baptist Parish, where the few white students living on the west bank had elected to attend a west bank school that was more than 70% black, and the west bank schools were separated from the east bank schools by the Mississippi River. 419 F. 2d at 1221.

There is likewise no merit to petitioner's suggestion (Pet. 6-11) that the district court's refusal to order injunctive relief other than a freedom-of-choice plan was not an appealable order under 28 U.S.C. 1292(a).